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Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

MERRELL DOW PHARMACEUTICALS INC.,
Petitioner,

v.

MARY VIRGINIA OXENDINE,
Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
DISTRICT OF COLUMBIA COURT OF APPEALS**

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QUESTIONS PRESENTED

1. Where a trial court determines that perjured testimony deprived a party of a fair trial, may an appellate court overturn that determination by holding that the party should have discovered before trial information necessary to expose any subsequent perjury, even though the trial court found as fact that the party acted diligently and timely in uncovering the perjury and in presenting it as grounds for a new trial?
2. Where a judgment is not yet final, may an appellate court refuse to consider subsequent changes in law that may cause it to modify a previous decision?

PARTIES TO THE PROCEEDINGS

Mary Virginia Oxendine was the appellant before the District of Columbia Court of Appeals.

Petitioner Merrell Dow Pharmaceuticals Inc. was the appellee before the District of Columbia Court of Appeals.

As required by Rule 28.1, Merrell Dow states that its parent companies, subsidiaries (not including wholly-owned subsidiaries) and affiliates are as follows:

Marion Merrell Dow, Inc.; Marion Laboratories Inc.; The Dow Chemical Company; Alamo Land Company, Inc.; Arabian Chemical Company Limited; Chief Shipping Company; Chimtrade; Compagnie des Services Dowell Schlumberger; Cromarty Petroleum Company Limited; DCU/LB Trust; Dow Corning Corporation; Dow Elanco B.Z.; Dow Kakoh Kabushiki Kaisha; Dowell Schlumberger Canada Incorporated; Dowell Schlumberger Corporation; Dowell Schlumberger Incorporated; El Dorado Terminals Company; Etoxilados Del Plata S.A.; Eurosemences, S.A.; Family Com. e Ind. de Productos de Limpeza Ltda.; First Chemical Factoring S.p.A.; Fort Saskatchewan Ethylene Storage Corporation; Fort Saskatchewan Ethylene Storage Limited Partnership; Funai Pharmaceuticals Company Ltd.; Guarit-Essex, A.G.; H-D Tech Inc.; Haeger and Kaessner Ltd.; Joliet Marine Terminal Trust Estate; Laboratories Industriales Farmaceuticos Ecuatoianos (L.I.F.E.); M.D. Kasei Limited; MDP (Holdings) Ltd.; Oronzio de Nora S.A. (Lugano); Oronzio de Nora Technologies B.V.; Oronzio de Nora Technologies S.p.A.; P.T. Pacific Chemicals Indonesia; Pacific Cable Products Sendirian Berhad; Pacific Chemical Berhad; Pacific Chemicals (Pakistan) Ltd.; Pacific Plastics (Thailand) Limited; Petroquimica-Dow S.A.; Scotdrill Offshore Company; the Cynara Company; Transfformadora de Etileno S.A.; Ulsan Pacific Chemical Company Ltd.; Viopol S.A.; Vorkim Kimya Sanayi Ve Ticaret A.S.; Wabiskaw Explorations Ltd.; Zip Pak Incorporated.

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**PETITION FOR A WRIT OF CERTIORARI TO THE
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Merrell Dow Pharmaceuticals Inc. ("Merrell Dow") petitions this Court for a writ of certiorari to review the judgment of the District of Columbia Court of Appeals in this case.

OPINIONS BELOW

The trial court's original order granting Merrell Dow judgment notwithstanding the verdict is unreported and is reprinted in the Appendix to this petition ("App.") at 69a. The first decision of the Court of Appeals, reversing judgment in Merrell Dow's favor and reinstating the verdict, is reported at 506 A.2d 1100 and is reprinted at App. 43a. The trial court's findings and opinion, vacating the judgment under Rule 60(b) due to the perjury of plaintiff Oxendine's sole causation witness, is unreported and is reprinted at App. 17a. The trial court's order reaffirming its decision is unreported and is reprinted at

App. 40a. The second decision of the Court of Appeals, reversing the trial judge's grant of Rule 60(b) relief and ordering reinstatement of the original verdict, is reported at 563 A.2d 330 and is reprinted at App. 1a.

JURISDICTION

The judgment of the Court of Appeals was entered on August 11, 1989. App. 72a. A timely petition for rehearing or rehearing *en banc* was denied on September 29, 1989. App. 73a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

STATUTORY PROVISION INVOLVED

District of Columbia Superior Court Rule 60(b)(6), which is identical to Federal Rule of Civil Procedure 60(b)(6), provides in pertinent part that a trial court "may relieve a party . . . from a final judgment, order, or proceeding for . . . any . . . reason justifying relief . . .".

STATEMENT OF THE CASE

A. Introduction

In this case the D.C. Court of Appeals has twice reversed the trial court's determination that the jury's verdict should not stand. The first reversal was based on the appellate court's opinion that the evidence was so evenly weighted and the unchallenged testimony of plaintiff's key witness so impressive that the jury's verdict should be upheld, notwithstanding the trial judge's contrary view.

The second reversal—the one here at issue—occurred after the trial court found that plaintiff's key witness had perjured himself at trial and that the perjury warranted a new trial under Rule 60(b). In reversing this grant of new trial, the Court of Appeals insisted that its own previous affirmance of the verdict had to be upheld—

notwithstanding the perjury, and notwithstanding that in the interim every other appellate court reviewing the substantive evidence at issue had declared it insufficient as a matter of law to prove plaintiff's case.

This decision, as explained below, raises fundamental questions concerning the integrity of the judicial process in that it creates a new standard requiring counsel who oppose a witness, but not counsel offering the witness, to discover before trial information sufficient to confront the witness as to all possible perjury he might commit at trial. The decision is also contrary to the decisions of this Court prohibiting appellate courts from substituting their own factual findings and equitable discretion for that of the trial court, and requiring that appellate courts consider significant intervening changes in law where final judgment has not yet been entered.

B. The Trial, JNOV, and First Appellate Reversal

Mary Virginia Oxendine ("Oxendine" or "plaintiff") sued Merrell Dow on the ground that her birth defects were caused by her mother's use of Merrell Dow's morning sickness medication, Bendectin. The case was tried before a jury in the Superior Court for the District of Columbia. At trial, only one expert witness testified for plaintiff on the critical question of causation, Dr. Alan K. Done. He told the jury, *inter alia*, that he had expertise in teratology¹ (Court of Appeals Record ("R.") 833-34); that he was Professor of Pharmacology and Toxicology at Wayne State University Medical School in Detroit (R. 823-24); that he was Chairman of the Formulary Committee at Children's Hospital, the teaching hospital associated with the medical school² (R. 1032); and that, in addition to his teaching, administrative, and research obligations, he was currently treating patients at Children's Hospital

¹ Teratology is the branch of biological science which deals with malformations and birth defects.

² The Formulary Committee determines which medications may be used for patients at Children's Hospital.

(R. 1127-28). Unbeknownst to Merrell Dow, *all* of this testimony was false.

Relying on the strength of his claimed credentials, Dr. Done gave his opinion that Bendectin caused plaintiff's birth defects. This opinion was based not on any published, peer-reviewed studies or analyses of his own, but upon his review of certain studies available in the substantial body of medical and scientific literature devoted to the study of Bendectin.³ See App. 46a-56a. Significantly, as Dr. Done conceded, none of these studies or types of studies concluded or demonstrated that Bendectin caused birth defects. Dr. Done, however, testified that in his opinion the data when viewed in combination would support such a conclusion. App. 56a. Merrill Dow, by contrast, presented several expert witnesses who testified not only that none of the studies Dr. Done cited had proved that Bendectin was a teratogen, but also that, even after years of investigation and countless studies, a statistically significant relationship between Bendectin and plaintiff's birth defects has not been established. App. 56a-58a.

On May 27, 1983 the jury returned a verdict for plaintiff. Merrell Dow filed timely post-trial motions for judgment notwithstanding the verdict or, in the alternative, a new trial. By order dated September 1, 1983, the trial judge granted both motions, determining that Oxendine had failed to offer sufficient evidence that use of Bendectin by her mother proximately caused her birth defects. App. 69a-71a.

On March 25, 1986, the District of Columbia Court of Appeals reversed the trial court's decision, finding that the evidence was "fairly evenly weighted" and that the case was in substance a "'classic battle of the experts, a

³ The four categories of data reviewed by Dr. Done were chemical structure activity studies, *in vitro* (i.e., test tube or laboratory) studies, *in vivo* animal studies, and epidemiological studies. See App. 47a.

battle in which the jury must decide the victor.'” App. 64a, 59a (quoting *Ferebee v. Chevron Chemical Co.*, 736 F.2d 1529, 1535 (D.C. Cir.), cert. denied, 469 U.S. 1062 (1984)).

The Court of Appeals' first decision (“*Oxendine I*”) relied almost exclusively on the opinion testimony of Dr. Done, and stressed that “[t]he evidence . . . established that Dr. Done's methodology was *generally accepted in the field of teratology, and his qualifications as an expert have not been challenged.*” App. 59a (emphasis supplied). The court conceded that the categories of studies and data relied on by Dr. Done “showed little or nothing when viewed separately from one another” but, nevertheless, concluded that together they “produce[d] a whole that was greater than the sum of its parts: a foundation for Dr. Done's opinion that Bendectin caused appellant's birth defects.” App. 59a. The court accordingly reversed the trial court's decision and ordered reinstatement of the jury's verdict. App. 68a.

C. The Findings of Perjury and Grant of Rule 60(b) Relief

After the Court of Appeals' reversal of the judgment in Merrell Dow's favor and while the case was still pending, Merrell Dow learned for the first time that, prior to his testimony at trial, Dr. Done had been forced to resign his tenured faculty position because of widespread dissatisfaction with the quality of his work—in particular his failure to perform his teaching, clinical, and research responsibilities. See App. 36a; App. 19a-22a. Furthermore, Merrell Dow learned that several critical claims Dr. Done had made at trial were false.⁴

⁴ Although Merrell Dow learned shortly after trial of some information concerning Dr. Done's assertions at trial, both the trial court and the Court of Appeals held that Merrell Dow had no duty to investigate the assertions while it was still the prevailing party, and that it acted diligently to investigate them after the Court of Appeals reversed the judgment in Merrell Dow's favor. App. 4a-5a, 31a-32a, 36a.

Realizing that Dr. Done had likely perjured himself—and that the perjury may have prejudiced Merrell Dow in a case the Court of Appeals itself characterized as “fairly evenly weighted” in light of Done’s testimony (App. 64a)—Merrell Dow moved the trial court for relief from judgment under Rule 60(b).⁵ The trial court held a five-day hearing on the motion, receiving the testimony of several witnesses, including Dr. Done himself, the Dean of the Medical School, and the Chairman of the Department to which Dr. Done had been assigned. On February 11, 1988, the trial court granted Merrell Dow’s motion for a new trial pursuant to Rule 60(b)(6) and entered 46 detailed findings of fact regarding Dr. Done’s perjury and the action of the parties and counsel in uncovering the perjury. App. 34a-39a, 17a-33a. These findings were predicated both on the witnesses’ demeanor and credibility during the evidentiary hearing, as well as on the substance of their testimony. App. 21a, 23a, 24a.

Specifically, the trial court found that Dr. Done had engaged in a pattern of perjured testimony in proceedings in this and other cases, including the Rule 60(b) evidentiary hearing itself,⁶ and that Dr. Done had *knowingly*

⁵ D.C. Superior Court Rule 60(b) is identical to Fed. R. Civ. P. 60(b), and the D.C. courts construe the two rules *in pari materia*. See, e.g., *Lynch v. Meridian Hill Studio Apts., Inc.*, 491 A.2d 515, 518 n.4 (D.C. 1985); *Leiken v. Wilson*, 445 A.2d 993, 997 n.2 (D.C. 1982).

⁶ The trial court found that during the Rule 60(b) evidentiary hearing itself Done falsely testified (1) as to the nature of the circumstances surrounding his forced resignation when he swore, as he had in other proceedings, that “his departure from the Medical School was initially a leave of absence”; (2) that his numerous absences from the medical school in late 1982 and early 1983 were occasioned by health problems, when in fact he was giving extensive testimony as an expert witness in other cases during that period; and (3) that he treated patients at Children’s Hospital after his forced resignation from the medical school. App. 23a, 21a, 24a. Indeed, on this last point, Done testified on the

and *intentionally* given false testimony at the *Oxendine* trial in six areas, all of which related to his credentials and professional stature:

1. Dr. Done testified on May 9, 1983 that he was a member of the Wayne State University Medical School faculty, even though his forced resignation had been submitted and accepted by the Dean of the School only days before Dr. Done gave that testimony (*i.e.*, on April 24 and 29, 1983, respectively). App. 21a-23a.
2. Dr. Done testified (both at the trial and in other courts) that he was Chairman of the Formulary Committee at Children's Hospital, even though he had been removed from that position more than a year before. App. 26a, 18a.
3. Dr. Done testified that he was currently responsible for a fully staffed laboratory at which research was being conducted at his request and under his direction, even though (a) he had no laboratory assigned solely to him for the two years prior to his testimony, (b) he had conducted no research projects at any laboratory during that time, and (c) the Medical School had taken the rare step of reassigning laboratory space from Dr. Done to another person due to Done's lack of research productivity. App. 22a, 27a, 18a.
4. Dr. Done testified that he was responsible for the treatment and care of patients at the time of his testimony, even though he had no such responsibilities. App. 27a.
5. Dr. Done testified that he was a professor of Pharmacology and Toxicology at the Medical School,

first day of the evidentiary hearing that he did *not* treat patients after the resignation but then gave absolutely contradictory testimony on the second day. App. 24a, 27a.

but admitted at the evidentiary hearing that no such rank existed. App. 27a.⁷

6. Dr. Done gave testimony implying that he was an expert in teratology and epidemiology, but admitted at the evidentiary hearing that he was not, in fact, an expert in these fields. App. 28a, 24a.

Based on the foregoing, the trial court stated that it "had an opportunity to hear Dr. Done's testimony and to observe his demeanor on the witness stand, and finds that he was not a credible witness." App. 23a.⁸ More importantly, the trial court concluded that Done's testimony

was so deliberately false that *all* his testimony on behalf of plaintiff is suspect. His lies went so much toward enhancing his status as a witness that he reeks of the hired gun who will say anything that money can buy so long as it is glibly consistent with his prior testimony in other cases. In a proverbial spiral his professional witness status led him to shirk his duties at the Wayne State Medical School. That got him fired (gently, by a forced resignation). The true circumstances of that resignation detracted from his professional witness status, and so he covered it up with lies to maintain his purported status. [App. 36a-37a; emphasis in original.]

⁷ During the evidentiary hearing Done admitted, in connection with this particular bit of false testimony, "that toxicology was an important aspect of his testimony at the trial of this case, and that it was important to him that the jury believe that he was knowledgeable and well-respected as one could be in the field of toxicology." App. 27a n.40 (emphasis supplied).

⁸ In contrast, the trial court found that two other witnesses who testified at the evidentiary hearing and who contradicted Done's testimony were credible based upon their demeanor. These findings applied to Dean Henry L. Nadler of the Medical School and Dr. Ralph Kauffman, Chairman of the department to which Done had been assigned. App. 24a, 21a.

Finding that "there [was] a substantial danger" that Done's lies were "the crucial difference" at trial, the court concluded, pursuant to Rule 60(b)(6), that as a matter of fairness and justice a new trial was warranted. App. 36a, 38a.⁹

Moreover, in further support of its determination that Dr. Done's false testimony prejudiced Merrell Dow before the jury, the court noted that it was Done's own "methodology [that] produced his unique conclusions," that his opinion was in any event a "profoundly minority view within the scientific community," and that, indeed, a recent federal-court decision in the District of Columbia had expressly determined that Done's opinion was "contrary to the 'now nearly universal scientific consensus that Bendectin has not been shown to be a teratogen, and, the issue being a scientific one, reasonable jurors could not reject that consensus without indulging in' impermissible conjecture." App. 37a, 38a (quoting *Richardson v. Richardson-Merrell Inc.*, 649 F.Supp. 799, 803 (D.D.C. 1986), *aff'd*, 857 F.2d 823 (D.C. Cir. 1988), *cert. denied*, 110 S.Ct. 218 (1989)).

Finally, the trial court concluded that both Merrell Dow's counsel and plaintiff's counsel had acted reasonably and diligently in connection with the investigation and detection of Done's perjury. Specifically, with regard to plaintiff's counsel, the Court did not believe that they had "actual knowledge, nor . . . should have known of Dr. Done's situation or that they had a duty to inquire further

⁹ In addition to finding that Dr. Done's trial testimony was false, the trial court also found that Done had submitted a false affidavit to the Court of Appeals on June 6, 1986 in which he swore that all of his trial testimony was accurate. App. 28a; R. 805 & R. (exhibits only) 3. Indeed, counsel for Oxendine not only prepared and filed that affidavit but even filed their own affidavits in the Court of Appeals which, among other things, attested to the veracity of Done's trial testimony. Exhibits 2 and 3 to Response of Plaintiff-Appellant to Merrell Dow's Motion to Stay Deliberations as to Petition for Rehearing En Banc, Etc. (filed June 10, 1986); see App. 30a-31a.

...." App. 35a. Similarly, with regard to Merrell Dow's counsel, the court found as fact that they had "no actual knowledge, nor should have known, nor had a duty to inquire" into Dr. Done's circumstances. App. 36a.¹⁰

D. The Second Reversal

On June 21, 1988, the Court of Appeals accepted plaintiff's application for interlocutory appeal of the trial court's decision. On that appeal, Merrell Dow contended that the trial court's grant of new trial should be affirmed on either of two grounds: (1) because the trial judge's findings that Dr. Done had repeatedly lied were not clearly erroneous and because the judge acted within his discretion in determining that the lies may have prejudiced Merrell Dow before the jury; and (2) because dramatic developments in the law affecting Bendectin—all of which had occurred since the *Oxendine I* decision—demonstrated that Dr. Done's testimony was in any event insufficient as a manner of law to sustain the jury's verdict.

With regard to the latter point, Merrell Dow showed that three important legal underpinnings of *Oxendine I* had altered since the Court of Appeals handed down that decision. First, as earlier noted, *Oxendine I* had relied on the D.C. Circuit's decision in *Ferebee* for the proposition that all battles between experts are to be decided solely by juries. But following *Oxendine I*, the very court which decided *Ferebee* limited that decision to situations where the experts' battle stood "at the frontier of current medical and epidemiological inquiry." *Richardson v. Richardson-Merrell Inc.*, 857 F.2d 823, 832 (D.C. Cir. 1988), cert. denied, 110 S.Ct. 218 (1989). In such situations, "[i]f experts are willing to testify . . . and their meth-

¹⁰ The court made these findings with regard to plaintiff's counsel because, had they failed in their duty to detect the perjury, relief would have been due Merrell Dow under Rule 60(b)(3); and the court made the findings with regard to Merrell Dow's counsel because, had those counsel not been diligent, the Rule 60(b)(6) motion would have to have been denied as untimely.

odology is sound, the jury's verdict should not be disturbed." *Id.* at 832.

But where a dispute is not "at the frontier" of the scientific question at issue, but, instead, is "at the other end of the spectrum"—one where the scientific evidence is so extensive and overwhelming that it lends itself to judicial analysis under the policy of Federal Rule of Evidence 703¹¹—not all expert opinions should go to the jury. *Id.* at 832. *Richardson* held that the scientific evidence in Bendectin cases is indeed "at the other end of the spectrum" and, accordingly, found *Ferebee* inapplicable.

The second, related legal development since *Oxendine I* is that the scientific evidence concerning causation in Bendectin cases has now reached a state where the courts are able to determine whether a given expert's opinion is so unsupported, in light of the overwhelming weight of numerous epidemiological studies, that that opinion is not admissible. The D.C. Circuit in *Richardson*, the First Circuit in *Lynch v. Merrell-National Laboratories*, 830 F.2d 1190, 1194, 1196 (1987), and the Fifth Circuit in *Brock v. Merrell Dow Pharmaceuticals Inc.*, 874 F.2d 307, *opinion modified on reh'g petition*, 884 F.2d 166, *reh'g en banc denied*, 886 F.2d 1314 (1989), have all recently reviewed that scientific evidence as it relates to causation in Bendectin cases and have held that the claimed basis for Dr. Done's opinion renders it inadmissible as a matter of

¹¹ Fed. R. Evid. 703 provides that:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

The policy of Rule 703 has been expressly adopted by the D.C. Court of Appeals. *L.C.D. v. District of Columbia*, 488 A.2d 918, 921 n.8 (1985).

law. Equally important, *every* court that has reviewed this question since the D.C. Circuit's *Richardson* decision has likewise held that Dr. Done's opinion (or one like his) is insufficient to sustain a jury verdict.¹²

The final significant development since *Oxendine I* is this Court's recent clarification—if not reinterpretation—of the circumstances in which it is appropriate for a trial judge to take a case from a jury. In a trilogy of cases decided after *Oxendine I*—*Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); and *Matsushita Electrical Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986)—the Court construed the rules governing summary judgment and directed verdict to require judges to assess the character and persuasiveness of the evidence adduced. It is no longer enough that a party present “some evidence” or a “colorable” opinion supporting its position or raise a “metaphysical doubt” about a fact in issue. *Anderson*, 477 U.S. at 249, 251; *Matsushita*, 475 U.S. at 586. Neither should a judge permit a jury to make “implausible” inferences from the evidence presented. *Id.* at 593.

¹² See *Brock v. Merrell Dow Pharmaceuticals Inc.*, 874 F.2d 307, opinion modified on reh'g petition, 884 F.2d 166, reh'g en banc denied, 884 F.2d 167 (5th Cir. 1989); *Hull v. Merrell Dow Pharmaceuticals Inc.*, 700 F. Supp. 28 (S.D. Fla. 1988); *Daubert & Schuller v. Merrell Dow Pharmaceuticals Inc.*, Nos. 84-2013-G, 84-29290G (Consolidated), Memorandum Decision and Orders (S.D. Cal. Nov. 1, 1989); *Ambrosini v. Richardson-Merrell Inc.*, C.A. No. 86-278 (D.D.C. June 30, 1989); *Koller v. Richardson-Merrell Inc.*, C.A. No. 80-1258 (D.D.C. June 30, 1989); *DeLuca v. Merrell Dow Pharmaceuticals Inc.*, No. 87-226 (D.N.J. June 7, 1989); *Bernhardt v. Richardson-Merrell Inc.*, No. DC85-39-B-D (N.D. Miss. Apr. 24, 1989); *Hagle v. Mt. Clemens General Hospital*, No. 83-3300-NM, Opinion and Order (Cir. Ct. Mich. Nov. 28, 1989); *DePyper v. Navarro*, No. 83-303-467 NM (Cir. Ct. Mich. Mar. 10, 1989); *Monahan v. Merrell-National Laboratories*, Civ. No. 83-3108-WD (D. Mass. Dec. 18, 1987) (pre-*Richardson*).

Rather, the judge should determine whether one party's evidence is "not significant[ly] probative" or whether the record as a whole "is so one-sided that one party must prevail as a matter of law." *Anderson*, 477 U.S. at 249-50, 252. Moreover, where these circumstances are presented judges have the power to enter summary judgment *sua sponte*. *Celotex*, 477 U.S. at 326.¹³

Given this change in the law regarding Bendectin and the heightened responsibility of judges to determine which cases present legitimate jury issues and which do not, it is now clear that not every "battle of experts" presents an issue in which only the jury may determine the victor. It is also clear that there is simply no legally adequate expert evidence demonstrating that Bendectin causes birth defects. For this reason, not a single appellate court—with the single exception of *Oxendine I*—has upheld a Bendectin verdict.

None of these developments mattered to the D.C. Court of Appeals. In an opinion dated August 11, 1989, that court reversed the granting of 60(b) relief, and remanded with instructions to reinstate the verdict as ordered in *Oxendine I*. Refusing to let either Dr. Done's perjury, the trial judge's findings, or the recent changes in decisional law affect its own previous decision, the Court of Appeals in *Oxendine II* declared that "*Oxendine I* settled the question regarding appellant's entitlement to a verdict in her favor on the basis of Dr. Done's testimony." App 15a (emphasis supplied).

Thus, while the Court of Appeals did not question that Dr. Done had indeed given false testimony at trial in numerous instances, and furthermore acknowledged that its review of the trial court's decision granting relief on

¹³ Federal Rule of Civil Procedure 56, interpreted in the cited cases, is identical to District of Columbia Rule 56, which is similarly interpreted. See *Cohen v. Owens & Co.*, 464 A.2d 904, 906 n.3 (D.C. 1983).

the basis of that testimony was "limited to determining whether the judge abused his discretion," App. 7a, it nevertheless reversed the trial court for two reasons. First, it noted that *its own* "reading of the record differs substantially" from the trial court's, App. 10a, and that what the trial court found to be perjury may have been nothing more than slips of the tongue or innocent "use[s] [of] the wrong verb tense." App. 11a.

Second, and the reason the court stated to be the basis for its decision to disregard nearly all the perjury, was the court's declaration that Merrell Dow's counsel "show[ed] a lack of diligence" in not having adequately discovered *before* trial *all* information needed to detect the perjury at trial. App. 9a. The court made this declaration without examining or questioning the directly contrary *findings* as to diligence made by the trial court, and without explaining how Merrell Dow's counsel could be charged with knowing of the false testimony when plaintiff's own counsel were not similarly charged.

Instead, with no examination of the record whatever on the question of diligence, the Court of Appeals refused even to consider the false testimony and held that the trial court had itself erred in considering it. App. 8a. The only exception to this, the court said, was Dr. Done's false statement about his departure from the University. App. 8a-9a. But this one statement, standing alone, the court found insufficient to have affected the jury's verdict and, the court speculated, had the jury known of it, plaintiff, "in any event, probably would have been allowed to respond with rehabilitative evidence on Dr. Done's behalf." App. 14a.

Finally, with regard to the significant changes in law requiring courts to examine the basis of proffered expert testimony and unanimously holding Dr. Done's testimony insufficient to prove that Bendectin causes birth defects, the Court of Appeals held that the trial court should

not have even considered such law and furthermore refused to consider that law itself. App. 16a. The court therefore ordered the trial court to reinstate the original verdict. App. 16a.

On August 25, 1989, Merrell Dow filed a timely petition for rehearing or rehearing *en banc* which was denied on September 29, 1989. App. 73a-74a.

REASONS FOR GRANTING THE WRIT

The decision below: (1) contradicts decisions of this Court requiring that appellate courts not substitute their own factual findings for those of trial courts; (2) threatens the integrity of the judicial process by effectively condoning perjury and by creating a new standard requiring opposing counsel—but not proposing counsel—to detect perjury at trial; and (3) contradicts decisions of this Court requiring appellate courts to consider recent changes in law where judgments are not yet final. For these three reasons, discussed below, certiorari is appropriate.

1. So anxious was the court to vindicate its earlier ruling in *Oxendine I* that it broke a cardinal rule of appellate review: it substituted its own view of the facts for those of the trial court. This Court has long made clear that appellate courts have no such authority. They may set aside a trial court's findings *only* if those findings are "clearly erroneous" and *only* if "due regard" is first given to the trial court's opportunity to judge the credibility of the witnesses. See, e.g., *Amadeo v. Zant*, 86 U.S. 214 (1988); *Anderson v. City of Bessemer*, 470 U.S. 564, 573-76 (1985); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969).

The Court of Appeals clearly did not follow these requirements. Instead, it simply announced that its own "reading of the record differs substantially from" the trial court's; and, worse, it summarily declared—without analysis or even reference to the trial court's contrary

findings—that Merrell Dow had not acted diligently in detecting Done's perjury. Because the court's refusal to accept the trial court's findings is the basis of its decision—and because that refusal directly violates this Court's decisions—certiorari is appropriate.

2. Moreover, the effect of the decision below is to condone—perhaps even to invite—perjury, and thereby to undermine the integrity of the judicial process. Significantly, the court did not dispute that considerable false testimony had been given by the *sole causation witness* in a case the court itself had previously characterized as "fairly evenly weighted." App. 64a. Rather, it held that the perjury should be overlooked because counsel did not act diligently in discovering before trial all information necessary to detect it at trial. Even apart from the contrary findings of the trial court on this very point, this holding is *fundamentally wrong* for two reasons.

First, the holding ignores *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238 (1944), where in related circumstances this Court held:

The Circuit Court . . . thought Hazel had not exercised proper diligence in uncovering the fraud and that this should stand in the way of obtaining relief of perjury. We cannot easily understand how, under the admitted facts, Hazel should have been expected to do more than it did to uncover the fraud. But even if Hazel did not exercise the highest degree of diligence, Hartford's fraud cannot be condoned for that reason alone. . . . [T]ampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society. *Surely it cannot be that preservation of the integrity of the judicial process must always wait upon the diligence of litigants.* The public welfare demands that the

agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud. [*Id.* at 246 (emphasis supplied).]

Second, and more importantly, in upholding the verdict in this case—notwithstanding that it rests on perjured testimony—the court below adopted a novel, unfair rule of law that will serve to insulate such perjury from judicial review. As noted, the Court of Appeals ignored the trial court's determination that Merrell Dow's counsel acted diligently to uncover Dr. Done's perjury and held without explanation that, except for one, all of Done's "misrepresentations" were discoverable by Merrell Dow prior to trial. App. 9a. It therefore refused to consider those lies as tainting the verdict.

The effect of this ruling is to create a new "diligence" rule for trial preparation: counsel *opposing* an expert witness must discover before trial and be prepared to confront at trial *any* possible perjury that expert may assert about his expertise, credentials, and qualifications, or else be barred from attacking that perjury later. Yet no corresponding duty—or any duty at all—is imposed by the court on counsel *proffering* the witness. This rule not only places a difficult new burden on opposing counsel to engage in what will ordinarily be wasteful investigation, but it imposes no burden at all on the very counsel in the best position to know whether the witness is fairly representing his credentials—the counsel sponsoring him.

The ethical standards of the legal profession impose directly applicable obligations on counsel proffering a witness, not on opposing counsel. Disciplinary Rule 7-102 (B) (2) requires counsel to disclose perjury by a person other than his client. Moreover, it is well settled that a lawyer may not call a witness if the lawyer knows that perjurious testimony may result.¹⁴ And in the case of

¹⁴ See, e.g., *In re Zanger*, 266 N.Y. 165, 172, 174, 194 N.E. 72, 74-75 (1935); *In re Schapiro*, 144 App. Div. 1, 128 N.Y.S. 852, 858 (1911).

a witness who will testify truthfully to some questions but falsely to others, a lawyer may not put a question to the witness knowing that he will respond with false testimony.¹⁵ In short, as this Court has observed:

The legal profession has accepted that an attorney's ethical duty to advance the interests of his client is limited by an equally solemn duty to comply with the law and standards of professional conduct; it specifically ensures that the client may not use false evidence. This special duty of an attorney to prevent fraud and disclose frauds upon the court derives from the recognition that perjury is as much a crime as tampering with witnesses or jurors by way of promises and threats, and undermines the administration of justice. [*Nix v. Whiteside*, 475 U.S. 157, 169 (1986).]

Thus, even if, contrary to the trial court's findings, Merrell Dow's counsel should have discovered or known of Dr. Done's perjury at trial, *so too should plaintiff's counsel*, who had used Dr. Done as an expert in other cases (see App. 28a-29a) and were far better positioned to detect his perjury. Yet, those counsel have not been charged with awareness of his perjury either at trial or before the Court of Appeals, even though those counsel actually filed briefs and sworn affidavits before the Court of Appeals directly supporting Dr. Done's claim that everything he said at trial had been true. App. 30a-31a. A rule that permits such action by plaintiff's counsel, while condemning opposing counsel for not knowing of the perjury, stands the law on its head. It furthermore serves to sustain jury verdicts that are admittedly tainted by perjury. Such a threat to reliable verdicts in the District of Columbia merits this Court's review.

3. Between the decision in *Oxendine I* and the trial court's granting of Rule 60(b)(6) relief, and continuing since then, a unanimous line of appellate cases has con-

¹⁵ E.g., D.R. 7-102(A)(4).

cluded, as a matter of law, that the available scientific evidence shows no causal connection between Bendectin and birth defects. Furthermore, the very case authority relied on in *Oxendine I* to insist that all battles between experts must be decided by the jury (*Ferebee*) has been expressly held to be inapplicable to Bendectin cases. Moreover, subsequent decisions by this Court have heightened the responsibility of trial judges to determine the legal sufficiency of evidence proffered for the jury's consideration.

Merrell Dow did not urge the lower court necessarily to adopt all these recent decisions, but only to consider them in determining what the law in the local jurisdiction should be and whether its own *Oxendine I* decision should be reconsidered; Merrell Dow furthermore urged the court at a minimum to permit the *trial court* to conduct a hearing to examine the recent scientific evidence on the issue—evidence which has persuaded all the cited courts (p. 12 n.12) that have considered it to announce a rule of law precluding verdicts for plaintiffs in cases such as the present one. Yet the panel refused even to consider the new legal developments, again insisting that *Oxendine I* was final on that question—even though *Oxendine I* had not even considered the question and even though the *Oxendine* case itself was not yet final. App. 16a & n.14.

This was plain error under this Court's decisions.¹⁶ To elevate the interest in finality to the point where it totally precludes even the consideration of significantly changed facts and law is to violate a fundamental prin-

¹⁶ The Court of Appeals implied that Merrell Dow was not entitled to challenge the admissibility of Dr. Done's testimony on the current appeal because that challenge had not been raised before. App. 16a n.15. This too is wrong. It is well settled that a prevailing party is entitled to raise on appeal any argument in support of a judgment in its favor, even if not raised before. *United States v. Arthur Young & Co.*, 465 U.S. 805, 814 n.12 (1984); *Dandridge v. Williams*, 397 U.S. 471, 475 n.6 (1970).

ciple of jurisprudence: that an appellate court must apply the law as it exists at the time of its decision. *Bradley v. School Board*, 416 U.S. 696, 711 (1974); *Linkletter v. Walker*, 381 U.S. 618, 627 (1965); *United States v. The Schooner Peggy*, 1 Cranch (5 U.S.) 103, 110 (1801). This principle necessarily applies where, as here, there was as yet no final judgment.

CONCLUSION

For all the foregoing reasons, the petition should be granted and the judgment below reversed.

Respectfully submitted,

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APPENDICES

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APPENDIX A

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 88-335

MARY VIRGINIA OXENDINE,
Appellant,

v.

MERRELL DOW PHARMACEUTICALS, INC.,
Appellee.

Appeal from the Superior Court of the
District of Columbia, Civil Division
(Hon. Peter H. Wolf, Motions Judge)

(Argued February 7, 1989 Decided August 11, 1989)

Barry J. Nace, with whom *Irving R. M. Panzer* was
on the brief, for appellant.

Walter A. Smith, Jr., with whom *Vincent H. Cohen*,
Alphonso A. Christian II, and *William D. Nussbaum*
were on the brief, for appellee.

Before ROGERS, *Chief Judge*, and FERREN and BELSON,
Associate Judges.

ROGERS, *Chief Judge*: Appellant Mary Oxendine appeals the grant of a motion under Super. Ct. Civ. R. 60 (b) (6) vacating a 1983 judgment in her favor and granting a new trial.¹ The motions judge found that appellee Merrell Dow Pharmaceuticals, Inc., was entitled to relief although the trial had commenced five years earlier and this court had confirmed appellant's entitlement to judgment three years ago in *Oxendine v. Merrell Dow Pharmaceuticals, Inc.*, 506 A.2d 1100 (D.C. 1986) (*Oxendine I*). As his ground for vacating the judgment,

¹ This is an interlocutory appeal. D.C. Code § 11-721 (d) (1981).

the motions judge found that appellant's sole causation witness "grossly misrepresented" his credentials to such an extent that all his testimony on appellant's behalf became suspect. Appellant contends that the motions judge abused his discretion first, because the motion was not filed "within a reasonable time," as mandated by the rule, since appellee had knowledge of the alleged misrepresentations at least three years earlier, and second, because the alleged misrepresentations, which were not about the substantive issues in the case, dealt only peripherally with the expert's credentials and, thus, did not meet the standard of materiality required for vacating a judgment and granting a new trial. Appellant also contends that the findings of deliberate and intentional misrepresentations are unsupported by the record.

We hold that the motions judge did not abuse his discretion in finding that the motion to vacate was timely filed, but that he did err in vacating the judgment and granting a new trial.

I

Eight years ago appellant Mary Oxendine filed suit against appellee claiming that her mother's use of Benedectin, a drug manufactured and produced by appellee for use by pregnant women, had caused appellant's birth defects and deformities. Appellant's sole causation witness at the jury trial, Dr. Alan K. Done, was qualified as an expert witness without objection by appellee.² Dr. Done testified that Benedectin caused ap-

² Dr. Done's Curriculum Vitae, which runs over twenty pages, shows that he has held numerous medical appointment and professorships, served on the editorial boards of a number of medical publications, and authored or co-authored at least 148 technical papers. He held the position of Special Assistant to the Director for Pediatric Pharmacology, Bureau of Drugs, U.S. Food and Drug Administration, for four years, participated as a speaker at numerous symposia and meetings, and has received many honors, fellow-

pellant's birth defects, basing his conclusion upon four types of scientific data which, he opined, taken together supported his conclusion. On May 27, 1983, the jury returned a verdict in favor of appellant, but on September 1, 1983, the trial judge, the Honorable Joseph M. Hannon, granted appellee's motion for judgment notwithstanding the verdict. Appellant appealed and this court reversed, ordering that the jury verdict in favor of appellant be reinstated. *Oxendine I*, 506 A.2d at 1114-15. On July 15, 1986, more than three years after the original trial, appellee filed a motion under Rule 60 (b) (6) claiming that Dr. Done had testified falsely at trial. Following an evidentiary hearing, Judge Peter H. Wolf³ granted the motion on February 11, 1988.

Judge Wolf found that Dr. Done knowingly and intentionally gave false testimony at trial in six areas, all of which, the judge conceded, related to Dr. Done's qualifications and not to any substantive issues in the case. Specifically, Judge Wolf found that Dr. Done testified at trial that:

(1) he was presently, on May 3 and May 11, 1983, a member of the Wayne State University Medical School faculty, when, in fact, he had submitted a letter of resignation from Wayne State dated April 24, 1983, to the Dean of the University, which the Dean accepted on April 29, 1983;

(2) he was, at the time of the trial, Chairman of the Formulary Committee at Children's Hospital, a hospital affiliated with the Wayne State Medical School, when, in fact, he had

ships and certifications in toxicology and pediatrics, including membership in a long list of prestigious medical societies and biographical directories.

³ Judge Hannon recused himself from further proceedings and the case was assigned to Judge Wolf.

ceased in January 1982 to be Chairman and in March 1982 to be a member of the Committee;

(3) he was presently responsible for a fully-staffed laboratory at Children's Hospital which conducted ongoing research at his request and direction, even though Dr. Done had no laboratory assigned solely to him for the two years prior to his testimony and had conducted no research projects at any laboratory during that time;

(4) he was presently responsible for the care and treatment of patients, even though after his resignation he had no such responsibilities; and

(5) he was a Professor of Pharmacology and Toxicology at the Wayne State Medical School, when no such faculty rank existed and his correct title was Professor of Pediatrics and Pharmacology.

Judge Wolf also found that Dr. Done implied at trial that he was an expert in teratology (the study of birth defects and malformations) and epidemiology (the study of disease incidence and control in a population), but later stated at the evidentiary hearing that he was not an expert in those entire fields.*

Regarding the knowledge of counsel for the parties, Judge Wolf found that neither counsel for appellant nor counsel for appellee had actual knowledge, or should have known, about Dr. Done's departure from the Wayne State Medical School prior to or during the trial, and that appellee's counsel did not have a duty to inquire about the circumstances of Dr. Done's departure when

* Judge Wolf cited three other alleged misstatements made by Dr. Done at the Rule 60 (b)(6) evidentiary hearing which are not relevant to the issue in the instant appeal regarding the effect of Dr. Done's trial testimony, but bear on Judge Wolf's estimation of Dr. Done's credibility generally.

they first learned on May 27, 1983, the day of the jury verdict, that he was no longer affiliated with the University. Appellee's counsel did not inquire further about Dr. Done's status until after this court in *Oxendine I* reinstated the jury verdict in March 1986. Appellant's counsel first learned in August 1983 about Dr. Done's resignation in connection with their preparation for Dr. Done's deposition in another case in which he was testifying as an expert.

II

Timeliness of Rule 60 (b)(6) Motion. Appellant contends that Judge Wolf abused his discretion in granting a Rule 60 (b)(6)⁵ motion so long after appellee first learned of Dr. Done's resignation. Appellee responds that it moved for relief very promptly after it had an outstanding adverse judgment from which to seek relief. Judge Wolf agreed with appellee that there was no adverse judgment from which it could seek relief until *Oxendine I* reinstated the jury verdict in March 1986, and found that appellee filed its motion within a reasonable time thereafter in June 1986. We agree.

A motion under subsection (6) of Rule 60 (b) must be made within a reasonable time, and what is reasonable depends upon the facts in each individual case. *Profitt v. Smith*, 513 A.2d 216, 218 (D.C. 1986). We will not reverse the trial court's decision that the motion was made within a reasonable time absent a clear abuse of

⁵ Super. Ct. Civ. R. 60 (b) (6) provides:

(b) *Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc.* On motion and upon such terms as are just, the Court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

* * *

(6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time

discretion. *Id.*; *Tribble v. American Mut. Ins. Co.*, 277 A.2d 659, 661 (D.C. 1971).

There is nothing in the record to suggest that appellee was aware of either the pre-trial change in Dr. Done's faculty status before the jury returned a verdict in appellant's favor, or of the reasons for Dr. Done's resignation before the trial judge granted appellee judgment notwithstanding the verdict. Hence, appellee could not have rectified the matter during the trial or grounded its motion for judgment notwithstanding the verdict on a claim that the verdict was obtained by fraud. Appellee learned on May 27, 1983, the date of the jury verdict, that Dr. Done was no longer affiliated with Wayne State University. This information, without more, was insufficient to give rise to a duty on appellee's behalf to conduct further discovery of Dr. Done's credentials after the jury had returned an adverse verdict. People leave universities for many reasons; leaving is not suspect in and of itself. Appellee still had no reason to believe that Dr. Done had not been affiliated with Wayne State at the time of his testimony or that the reasons for his departure were relevant to the outcome of the trial, as appellee now contends. This circumstance changed somewhat when appellee learned on October 5, 1983, shortly after the trial judge had granted its motion for judgment notwithstanding the verdict, that Dr. Done had ceased to be on the Wayne State faculty prior to his testimony at trial. But even then appellee did not know the reasons for Dr. Done's departure. Since appellee obtained this information after the entry of judgment in its favor, appellee had no further reason to inquire about Dr. Done's credentials, and any motion attacking the verdict would have been superfluous, being simply additional grounds on which appellee could argue that it was entitled to judgment.

Accordingly, we hold that Judge Wolf did not err in finding that appellee, upon learning in May 1983 of Dr.

Done's change in status, acted timely under the circumstances in filing its Rule 60 (b) (6) motion in July 1986, a little more than three months after *Oxendine I* was decided. See *Transit Casualty Co. v. Security Trust Co.*, 411 F.2d 788, 790-91 (5th Cir.), cert. denied, 404 U.S. 883 (1971); cf. 7 MOORE, FEDERAL PRACTICE, § 60.28 [2] at 60-316 & n.20 (1987).

III

Vacation of Judgment and Grant of a New Trial. Judge Wolf concluded that appellee was entitled to the "extraordinary relief [of vacation of a judgment and] a new trial after an appellate decision on the merits and almost five years after the original trial" because Dr. Done's "false testimony about his credentials" was "crucial" and created a "substantial danger that there was an unjust result" at the May 1983 trial. See Memorandum Order of February 11, 1986, at 3-5. Our review is limited to determining whether the judge abused his discretion. *Proffitt, supra*, 513 A.2d at 218; *Starling v. Jephunneh Lawrence & Assocs.*, 495 A.2d 1157, 1159 (D.C. 1985). Such an abuse exists if the trial court applies an incorrect standard of law or grants relief on the basis of findings of fact that are unsupported by the record. See D.C. Code § 17-305 (1981); *Designers of Georgetown, Inc. v. E.C. Keys & Sons*, 436 A.2d 1280, 1281 (D.C. 1981); *Robinson v. Jones*, 429 A.2d 1372, 1374 (D.C. 1981).

Rule 60 (b) (6) is intended for unusual and extraordinary situations justifying an exception to the overriding policy of finality. See *Klaprott v. United States*, 335 U.S. 601, 613 (1949); *Proffitt, supra*, 513 A.2d at 218 (citing *Railway Express Agency, Inc. v. Hill*, 250 A.2d 923, 925 (D.C. 1969); *Union Storage Co. v. Knight*, 400 A.2d 316, 318 (D.C. 1979); *Ohio Valley Constr. Co. v. Dew*, 354 A.2d 518, 521 (D.C. 1976)). Although relief under Rule 60 (b) (6) for "any other reason" is not to be narrowly construed, see *Starling, supra*, 495

A.2d at 1161 (citing *Klaprott, supra*, 335 U.S. at 614), for a verdict to be vacated on the ground of perjured testimony it must be clear that the perjury was material and not merely incidental to the contested issue. *Coleman v. Chudnow*, 35 A.2d 925, 927 (D.C. 1944).⁶ To award a new trial, the evidence must in fact have been newly discovered since the trial, its recent discovery cannot be due to a lack of diligence by the movant, and the evidence cannot be merely cumulative or impeaching but must be such as would probably produce a different verdict if a new trial were granted. *Mahallati v. Williams*, 479 A.2d 300, 305 (D.C. 1984); *Bradley v. Prince*, 105 A.2d 253, 254-55 (D.C. 1954).

The six misstatements found by Judge Wolf to constitute perjury concern Dr. Done's qualifications, not his opinions or methodology. Based on our review of the record before Judge Wolf, only Dr. Done's misrepresenta-

⁶ See also Judge (now U.S. Supreme Court Justice) Brennan's oft-quoted standard in *Shammas v. Shammas*, 9 N.J. 321, 88 A.2d 204 (1952), for granting postjudgment relief under Rule 60 (b) (3) for fraud based on perjured testimony of a party:

. . . a court may not set aside a final judgment merely because some testimony is perjured. . . . Perjured testimony that warrants disturbance of a final judgment must be shown by clear, convincing and satisfactory evidence to have been, not false merely, but to have been wilfully and purposely falsely given, and to have been material to the issue tried and not merely cumulative but probably to have controlled the result. Further, a party seeking to be relieved from the judgment must show that the fact of the falsity of the testimony could not have been discovered by reasonable diligence in time to offset it at the trial or that for other good reason the failure to use diligence is in all the circumstances not a bar to relief.

9 N.J. at —, 88 A.2d at 208-09 (citations omitted); accord, *Hohensee v. Grier*, 373 F. Supp. 1358, 1365 (M.D. Pa. 1974), aff'd, 524 F.2d 1403 (3d Cir. 1975), cert. denied, 426 U.S. 940 (1976). Cf. *Neuman v. Neuman*, 377 A.2d 393, 397 (D.C. 1977) (citing *Shammas v. Shammas, supra*, and other cases regarding interest in finality of judgments in denying, on ground of equitable estoppel, the vacation of a divorce decree).

tion regarding his faculty status at Wayne State University at the time of trial requires extended discussion and, accordingly, we first dispose of the other five.

Five of Dr. Done's statements found by Judge Wolf to be misrepresentations were matters either previously known or readily capable of being learned by appellee in the course of conducting pretrial discovery about Dr. Done's qualifications as an expert. As such, they cannot be considered to have been newly discovered, and the failure to discover them prior to trial shows a lack of diligence by appellee for which it has provided no explanation. See *Chong Moe Dan v. Maryland Casualty Co.*, 93 A.2d 286, 287-88 (D.C. 1952); *Great Southwest Fire Ins. Co. v. S.M.A. Inc.*, 59 Md. App. 136, ___, 474 A.2d 950, 957, cert. denied, 301 Md. 42, 481 A.2d 801 (1984). Judge Wolf found that Dr. Done had not been a member of the Formularily Committee at Children's Hospital since March 1982, that he had not been Chairman of the Committee since January 1982, that he had not been on the patient wards since December 1982, and that he had not had a laboratory assigned solely to him for two years before the trial and had conducted no research at any other laboratory during that period. The failure to know Dr. Done's exact title as professor and the areas of his expertise reveals a similar lack of diligence by appellee since the matters could have been learned during discovery. Except for Dr. Done's status at the University at the time of his testimony, which he concealed from both parties during trial, all the misrepresentations were discoverable prior to trial and, consequently, were matters of impeachment which could have been presented to the jury. As such, they cannot form a proper basis for granting the relief requested by appellee. See *Hohensee v. Grier, supra*, 373 F. Supp. at 1365 ("inconceivable" movant could not have controverted alleged perjury at trial).

Moreover, Judge Wolf's findings that in these five instances Dr. Done committed perjury, which requires proof

of willfulness, *see* D.C. Code § 22-2511 (1988 Supp.), gives us pause since our reading of the record differs substantially from his, though we do not base our decision on this ground. Dr. Done's testimony regarding his laboratory work is equally consistent with the fact that other professors shared the lab;⁷ his testimony about his relationship to patients refers not to his responsibilities for seeing patients on the particular day on which he testified, but to his responsibilities over the year generally;⁸ and he explained that he taught toxicology as

⁷ Dr. Done testified as follows:

Q. [Defendant's attorney] What percentage of time do you spend doing research?

A. [Dr. Done] Well, I don't myself have to perform most of the research now, that I do in the laboratory, at least, because I have a full crew that does that and a man who directs the laboratory for me.

So I am in charge of it in terms of overlooking it but not having to actually do all with my own hands.

Now, the percentage is again difficult to estimate. It depends on whether you include the writing of it. If you do, that is, oh, I would judge, probably 20 percent in the last year, maybe 15.

At the evidentiary hearing, it was explained that the laboratory which Dr. Done was referring to was shared by all faculty members who had research proposals, and that the person who directed the lab did so for all of them. At another point during the May 1983 trial, Dr. Done testified that he did not have a lab solely for his own use at Children's Hospital.

⁸ The relevant testimony was:

Q. [Defendant's attorney] When is the last time you were on the ward before today?

A. [Dr. Done] In December.

Q. December of 1982?

A. That's right.

Q. Well, then, would that mean between December 1982 and now, May of 1983, you haven't been responsible for the care and treatment of patients?

A. No, not at all. I was saying that when I am doing that, I am responsible for all the patients on a particular ward,

part of the course of pharmacology.⁹ It is hardly unusual for a witness who is on the stand for hours, as was Dr. Done, to slip up, use the wrong verb tense, or misspeak at times. See *Metlyn Realty Corp. v. Esmark, Inc.*, 763 F.2d 826, 833 (7th Cir. 1985).

As to Dr. Done's trial testimony that he was on the medical faculty at Wayne State University as of May 1983, the record supports Judge Wolf's finding that Dr. Done misrepresented his status at the University. The judge could properly reject Dr. Done's explanation at the Rule 60 (b)(6) hearing that at the time of trial he believed he was still on the faculty,¹⁰ and credit instead the testimony of Dean Nadler of Wayne State University who testified that he accepted Dr. Done's resignation by letter dated April 29, 1983, which he sent to Dr. Done, and that Dr. Done was no longer considered a member of the Medical School faculty on May 9, 1983, or any date thereafter. See *Flippo Constr. Co. v. Mike Parks Diving Corp.*, 531 A.2d 263, 273 (D.C. 1987). Dr. Done requested in his letter of resignation that his termination be effective by the end of April. The record also sup-

and so that will occupy roughly half of my time while I am attending.

I see patients all through the year in terms either of their being referred to me because it is in my area of special interest or I am to consult, if I am teaching students or house officers.

Then I will see them then because almost all of my teaching, in pediatrics at least, is bedside teaching on patients.

I see patients all through the year. Patient-wise, that will vary all the way from five or ten percent, some months, up to 50 percent in some months.

⁹ Dr. Done maintains that the court reporter and not he put the capital letters on pharmacology and toxicology, thus creating the supposed faculty title.

¹⁰ Dr. Done testified at the Rule 60 (b)(6) hearing that, when he sent his letter of resignation, he was hoping to work out some other arrangement with the University.

ports Judge Wolf's finding that counsel for neither party was aware prior to or at trial that Dr. Done's status at the University had changed. Therefore, this evidence was new and not discoverable by appellee by reason of due diligence.

The question remains whether this finding of perjury is material and would have affected the outcome of the trial. The evidence before Judge Wolf reveals that the issue between Dr. Done and the University concerned his loyalty to the University, not his qualifications or expertise, and nothing in the record disputes Dr. Done's qualifications to teach and his significant contributions to his fields of expertise. In view of Dr. Done's extensive resume, the minor portion of Dr. Done's testimony before the jury at issue, and the evidence presented to the Rule 60 (b) (6) hearing concerning the circumstances leading to Dr. Done's resignation, we hold that Judge Wolf erred in concluding that Dr. Done's misrepresentation about his faculty status would have affected the outcome of the trial.

Judge Wolf stated in his Memorandum Order, for example, that Dr. Done's

professional witness status led him to shirk his duties at the Wayne State Medical School. That got him fired (gently, by a forced resignation). The true circumstances of that resignation detracted from his professional witness status, and so he covered it up with lies to maintain his purported status.

Memorandum Order at 4. The judge also stated that Dr. Done's trial testimony "grossly misrepresented his standing in the educational community." *Id.* at 6. Dr. Done admitted that while on the medical faculty at the University he had testified as an expert in numerous trials and that this took him away from the campus. But there was uncontroverted evidence that Wayne State retained a very high opinion of Dr. Done's academic

capabilities and professional contributions. Dean Nadler testified that he did not ask for Dr. Done's resignation because of any concern that Dr. Done's academic reputation had deteriorated, but because of other problems, such as Dr. Done's absences from the hospital and his failure to attract external research funding. The Dean explained that the University had to reevaluate and let go faculty members in the early 1980s in response to budget cuts mandated by the State of Michigan as a result of the 1981 recession. Dean Nadler also testified that he had not been concerned with the quality of Dr. Done's teaching; in fact, he was sorry to see Dr. Done leave because Dr. Done had made "significant contributions to pediatrics and toxicology" while at the University. Indeed, in his letter accepting Dr. Done's resignation, Dean Nadler stated that he was willing to discuss with Dr. Done the "possibility of some voluntary affiliation." In addition, although Judge Wolf discredited Dr. Done's testimony in this regard, there was independent evidence in the form of a letter written by Dr. Done's immediate supervisor that Dr. Done had serious health problems which contributed to his not being able to fulfill all his teaching obligations at the University.¹¹

¹¹ On January 18, 1983, Dr. Done's immediate supervisor, Larry E. Fleischmann, M.D., Professor and Interim Chairman, Department of Pediatrics, Wayne State University, School of Medicine, wrote to Dr. Done:

. . . regarding [my] concern over your health problems and the difficulties they have caused you in relation to your academic duties. . . . [they] have prompt[ed] me to inquire as to whether in the opinion of yourself and your physicians, these problems would continue to give you significant difficulty in the area of the performance of your academic duties, particularly in regard to resident and student teaching assignments in this time when the University's financial situation is causing us to ask more and more of our faculty members in regard to this most important [sic] of our duties. If it appears that the problems are of such chronicity that they will pose difficulty

Accordingly, the record does not support the conclusion either that Dr. Done's academic standing had deteriorated to the point that he would have been qualified as a witness at the original trial or that his credibility would have been so undermined by the circumstances surrounding his resignation from Wayne State University as to affect the jury's verdict. *See Potts v. Catterton*, 82 A.2d 133, 134 (D.C. 1951) (where evidence is merely cumulative or impeaching, strong doubt that it would necessarily lead to different result if case were retried).¹² Moreover, it is questionable whether the circumstances surrounding Dr. Done's resignation from Wayne State University would have "probably aid[ed] the trier in his search for truth," the standard for admitting testimony regarding an expert's qualifications, MCCORMICK ON EVIDENCE, § 13 at 29-31 (E. Cleary, 2d ed. 1972) (quoted in *Dyas v. United States*, 376 A.2d 827, 832 (D.C.), cert. denied, 434 U.S. 973 (1977)), or whether appellee would have been permitted to explore such collateral matters at trial. *See Washington v. United States*, 499 A.2d 95, 101 (D.C. 1985) (extrinsic evidence inadmissible to impeach a witness on collateral issues). If the evidence had been admitted, appellant, in any event, probably would have been allowed to respond with rehabilitative evidence on Dr. Done's behalf. *See Rease v. United States*, 403 A.2d 322, 327-28 (D.C. 1979).

. . . I would be willing to meet with you to discuss alternative arrangements other than a full-time "full load" arrangement.

Appellee's Exhibit No. 7.

¹² Judge Wolf's finding that Dr. Done's "lies went so much toward enhancing his status as a witness that he reeks of the hired gun who will say anything that money can buy so long as it is glibly consistent with his prior testimony in other cases," Memorandum Order at 4, is troubling. Appellee's expert witnesses at trial also were "hired guns," and, in any event, this is a matter about which appellee cross-examined Dr. Done at trial. The "hired gun" appellation does not advance the necessary analysis.

This is not a case involving an imposter, as in *Trapp v. American Trading & Prod. Corp.*, 66 A.D.2d 515, —, 414 N.Y.S.2d 11, 12 (1979), where the expert, contrary to his testimony, held no degree, graduate or undergraduate, never completed his freshman year in college, held no licenses in his field of expertise, and, in essence, was not an expert. Neither party disputes that Dr. Done has a distinguished forty-year career in his fields of expertise. Nor is this case like *Herington v. Smith*, 138 Ill. App. 3d 28, 485 N.E.2d 500 (1985), where the medical expert lied about the university and medical school from which he graduated and the kind of medical license he held. *Id.*, 138 Ill. App. 3d at —, 85 N.E.2d at 502.¹³ *Oxendine I* settled the question regarding appellant's entitlement to a verdict in her favor on the basis of Dr. Done's testimony; thus, not only is Judge Wolf's conclusion that Dr. Done's testimony at trial was "of doubtful

¹³ All the other cases cited by appellee either have more egregious facts, are not on point, or are otherwise distinguishable. In *Harre v. A.H. Robins Co., Inc.*, 750 F.2d 1501, 1503-04 (11th Cir. 1985), contrary to the instant case, the expert witness testified falsely on the ultimate substantive issue in the case. Moreover, *Harre* was criticized in *Metlyn Realty Corp.*, *supra*, 763 F.2d at 832 n.3, where the circuit court affirmed the denial of a motion under Rule 60 (b) (3) for alleged fraud in a tender-offer case. The court criticized *Harre* as "a bit strained," that judgments should be reopened only when the party's perjury was "extensive and right at the core of the issues" and not in "less serious cases of alleged fraud." *Id.* The court noted that most courts "are quite shy about reopening judgments on account of perjury even in criminal cases," *id.* (citing *United States v. Krasny*, 607 F.2d 840, 843 (9th Cir. 1979), cert. denied, 445 U.S. 942 (1980)), and inserted a long discussion of the "good reasons for the stringent limits on reopening a final judgment." *Id.* at 830. The court also noted, "the inevitable shortfalls of the legal system do not call for revisiting judgments. . . . even if the first proceeding was flawed, there is no assurance that the second proceeding will come closer to the truth." *Id. McKinney v. Boyle*, 404 F.2d 632 (9th Cir. 1968), cert. denied, 394 U.S. 992 (1969), is not on point because the court in that case merely reversed a denial of a Rule 60 (b) (3) motion and remanded on the ground that relief under Rule 60 (b) (6) may have been available.

logic" and "a profoundly minority view within the scientific community," Memorandum Order at 5-6, precluded by *Oxendine I*, it is not supported by his factual findings.¹⁴

Accordingly, the judgment is reversed and the case remanded to the motions judge to reinstate the jury verdict as directed in *Oxendine I*.¹⁵

Remanded with instructions.

¹⁴ Both appellee and Judge Wolf refer to the United States District Court judge's decision in *Richardson v. Richardson-Merrell, Inc.*, 649 F. Supp. 799 (D.D.C. 1986), *aff'd*, 857 F.2d 823 (D.C. Cir. 1988), granting appellee judgment notwithstanding the verdict, contrary to our decision in *Oxendine I*. However, as noted by the district court judge and the United States Court of Appeals for the District of Columbia Circuit, there was different evidence presented in *Richardson*. 649 F. Supp. at 802; 857 F.2d at 825 n.9. The record in *Richardson* is not before us, nor was it before Judge Wolf. Hence, it cannot influence our decision.

¹⁵ Appellee also asks this court to review the admissibility of Dr. Done's testimony at the May 1983 trial even though appellee never raised this issue at either the 1983 trial or the 1987 Rule 60 (b) (6) evidentiary hearing, or on the previous appeal. We decline to do so. This court addressed the merits in appellant's direct appeal, *see Oxendine I*, and appellee has presented no grounds on which to be entitled to raise this issue in this interlocutory appeal. Cf. *Chase v. Gilber*, 499 A.2d 1203, 1209 (D.C. 1985); *Miller v. Avirom*, 127 U.S. App. D.C. 367, 369-71, 384 F.2d 319, 322-23 (1967).

APPENDIX B

**SUPERIOR COURT OF THE
DISTRICT OF COLUMBIA
Civil Division**

C.A. No. 1245-82

Civil I—Judge Wolf

MARY VIRGINIA OXENDINE,

Plaintiff

v.

MERRELL DOW PHARMACEUTICALS, INC.,
Defendant

**FINDINGS OF FACT RELEVANT TO DEFENDANT'S
MOTION FOR RELIEF PURSUANT TO RULE 60(b)**

This matter came before the Court for an evidentiary hearing, held on January 20-23, 1987 and February 6, 1987, to determine if plaintiff's causation expert, Dr. Alan K. Done, testified falsely at trial of the above-captioned case in May 1983. Also before the Court is the related question of whether, when, and to what extent counsel knew or should have known that Dr. Done's testimony was false. Based on consideration of the testimony and exhibits introduced at the hearing, the Court makes the following Findings of Fact pursuant to Superior Court Civil Rule 52.

Findings of Fact Relating to Dr. Alan K. Done

1. In 1975, Dr. Alan K. Done received a tenured appointment to the faculty of the Wayne State University School of Medicine ("Medical School") in Detroit, Michigan.

gan, with the rank of Professor of Pediatrics and Pharmacology.¹ Dr. Done was assigned related teaching and clinical responsibilities with the Division of Clinical Pharmacology, Toxicology at Children's Hospital of Michigan (Children's Hospital"), which is affiliated with the Medical School.²

2. In 1975, Dr. Done was named Director of the Division of Clinical Pharmacology, Toxicology at Children's Hospital. Sometime between 1975 and 1981, he was appointed Chairman of the Formulary Committee at Children's Hospital.³

3. In 1979 or 1980, laboratory space previously assigned to Dr. Done at the Medical School was reassigned to another faculty member because of Dr. Done's lack of research productivity. Laboratory space was rarely taken from tenured faculty members at that time.⁴

4. In December 1981, Dr. Done was removed as Director of the Division of Clinical Pharmacology, Toxicology and replaced by Dr. Ralph E. Kauffman.⁵

5. In January 1982, Dr. Done was removed as Chairman of the Formulary Committee at Children's Hospital because of dissatisfaction with his performance. He was replaced by Dr. Kauffman.⁶

6. Dr. Done has not been Chairman of the Formulary Committee at Children's Hospital since the end of Decem-

¹ Transcript of proceedings of January 20, 1987 ("Tr. 1/20/87") at 36, lines 9-12; 38, lines 21-24. Transcript of proceedings of January 21, 1987 ("Tr. 1/21/87") at 28, lines 19-22.

² Tr. 1/20/87 at 54, lines 4-20.

³ Tr. 1/21/87 at 7, lines 9-11; 92, lines 20-22. Transcript of proceedings of January 22, 1987 ("Tr. 1/22/87") at 106, lines 12-16.

⁴ Tr. 1/22/87 at 22, line 17 to 23, line 4.

⁵ Id. at 106, line 12 to 107, line 6.

⁶ Id. at 111, line 7 to 112, line 18.

ber 1981, and has not served on the committee in any capacity since March 1982, when he was eliminated from the committee roster and so notified.⁷

7. By letter to Dr. Done dated January 18, 1983, Dr. Larry E. Fleischmann, Interim Chairman of the Department of Pediatrics, expressed his concerns and those of Dr. Bernard H. Marks, Chairman of the Department of Pharmacology, about Dr. Done's failure to perform his teaching and clinical duties at the Medical School. Dr. Fleischmann invited Dr. Done to meet with him and Dr. Marks to discuss the possibility of an arrangement other than full-time teaching.⁸ No such meeting ever took place.⁹

8. By memorandum to Dr. Henry L. Nadler, Dean of the Medical School, dated February 22, 1983, Dr. Marks expressed his concerns about Dr. Done's dereliction of his teaching responsibilities.¹⁰

9. Following his arrival as Dean of the Medical School in September 1981, Dean Nadler had numerous meetings with his colleagues in which Dr. Done's lack of productivity as a faculty member was discussed.¹¹

⁷ *Id.* at 112, line 20 to 113, line 20.

⁸ Hearing Exhibit ("Ex.") 7. On December 19, 1986, plaintiff deposed Dr. Fleischmann in preparation for the hearing in this matter. The entire transcript of that deposition ("Fleischmann Tr.") was offered by the parties and admitted by the Court as an exhibit at the hearing. Dr. Fleischmann testified that, at the time he wrote his January 18, 1983 letter to Dr. Done, he discussed the substance of the letter with Dean Nadler, and recommended that the Medical School investigate why Dr. Done was having trouble fulfilling his responsibilities. Fleischmann Tr. at 15, line 15 to 17, line 15.

⁹ Tr. 1/20/87 at 58, lines 2-20.

¹⁰ Ex. 8.

¹¹ Tr. 1/22/87 at 14, line 9 to 16, line 15.

10. On a date after February 22, 1983, and before April 18, 1983, Dean Nadler and Dr. Done had a meeting, in the Dean's office and at the Dean's request, to discuss deficiencies in Dr. Done's performance as a member of the Medical School faculty. Dean Nadler informed Dr. Done that he had failed to fulfill his responsibilities in teaching, research, and clinical care. Dean Nadler told Dr. Done that if he did not resign from the faculty, the Medical School would initiate proceedings to remove his tenure and to terminate him.¹²

11. By letter to Dr. Done dated April 18, 1983, Dr. Fleischmann reiterated the concerns he and Dr. Marks had previously expressed about Dr. Done's failure to perform his duties as a Medical School faculty member. Dr. Fleischmann stated three additional concerns, including Dr. Done's (1) failure to renew the Medicaid application form necessary for him to bill for professional services rendered in conjunction with his teaching responsibilities at Children's Hospital; (2) failure to file an approved absence report prior to a recent trip; and (3) regular use of University personnel for personal matters. Dr. Fleischmann once again suggested to Dr. Done that an arrangement other than a full-time faculty appointment might be appropriate, and stated that he and Dr. Marks would contact Dr. Done shortly to schedule a meeting to discuss these matters.¹³

¹² *Id.* at 13, line 2 to 14, line 4; 21, line 12 to 22, line 18; 23, line 5 to 24, line 20; 26, lines 3-25. At the hearing, Dr. Done admitted that, prior to his resignation, he wasn't fulfilling his teaching responsibilities. Tr. 1/20/87 at 56, lines 1-4.

¹³ Ex. 9. Dr. Fleischmann testified that he told Dean Nadler that these matters should be completely discussed with Dr. Done, and that Dr. Done's resignation might be appropriate. He said Dean Nadler told him that if Dr. Done could not perform his academic duties satisfactorily, it would be appropriate to ask for his resignation. Dr. Fleischmann also testified that he told Dean Nadler that he had heard that Dr. Done was not as highly thought

12. Prior to April 24, 1983, Dr. Kauffman expressed to Dr. Done his dissatisfaction with Dr. Done's performance as a Medical School faculty member. Dr. Kauffman criticized Dr. Done for failure to fulfill his faculty responsibilities, including teaching, caring for patients, handling administrative tasks, obtaining grants, conducting research, and publishing papers in peer review journals. Dr. Kauffman admonished Dr. Done for making personal long distance calls at University expense, and for utilizing the services of the division secretary for personal business.¹⁴

13. In the period between December 1981 and April 1983, Dr. Done was absent from the Medical School 100 days, or approximately one-third of the days on which he was required to be present during that period.¹⁵

14. By letter to Dean Nadler dated April 24, 1983, Dr. Done submitted his resignation from the faculty of

of in the academic community as he had been in the past. Fleischmann Tr. at 20, line 16 to 21, line 1; 31, lines 1-9; 33, line 23 to 34, line 7.

¹⁴ Tr. 1/22/87 at 120, line 25 to 122, line 12; 123, line 24 to 124, line 15. Dr. Kauffman testified at the hearing. The Court had an opportunity to hear his testimony and to observe his demeanor on the witness stand, and finds that he was a credible witness.

¹⁵ *Id.* at 24, line 21 to 26, line 2. At the hearing, Dr. Done acknowledged that, between 1979 and 1983, he testified in 36 different cases, and worked on approximately 72 additional litigated matters in which he did not testify. Tr. 1/20/87 at 48, lines 4-22. See also Ex. 40 at 1078, line 6 to 1085, line 24. He also acknowledged that, in December 1982, he testified at depositions in three matters (Tr. 1/20/87 at 47, lines 9-14; 50, line 3 to 51, line 24), and in January 1983, he was away from the Medical School testifying for 15 consecutive working days in two different cases. *Id.* at 65, line 24 to 66, line 13. See also Ex. 22. Nevertheless, at the hearing, Dr. Done testified that his frequent absences from his duties at the Medical School in late 1982 and early 1983 were due to serious, chronic health problems. Tr. 1/21/87 at 115, line 12 to 121, line 19. The Court does not credit Dr. Done's testimony in this regard.

the Medical School. The letter requested that "termination at least of salary and present positions in Pediatrics and Pharmacology may as well be effective at the end of this month."¹⁶

15. By letter dated April 29, 1983, and sent to Dr. Done's office at Children's Hospital, Dean Nadler accepted Dr. Done's resignation.¹⁷

16. Following his acceptance of Dr. Done's resignation, Dean Nadler immediately forwarded to the University personnel office the paperwork necessary to effectuate Dr. Done's termination from the faculty.¹⁸ The effective date of Dr. Done's resignation was May 3, 1983.¹⁹

17. During the two years preceding his resignation, Dr. Done did not have a laboratory at Children's Hospital assigned specifically to him.²⁰

18. During the two years preceding his resignation, none of the research being conducted in any of the laboratories at Children's Hospital related to work that Dr. Done was doing.²¹

19. Since May 3, 1983, Dr. Done has had no responsibility for the care and treatment of patients at Children's Hospital.²²

20. Dr. Done knowingly and intentionally testified falsely at the trial of this case on May 9, 1983 and May 11, 1983 when he stated that he was presently a mem-

¹⁶ Ex. 10.

¹⁷ Ex. 11.

¹⁸ Tr. 1/22/87 at 29, lines 14-23.

¹⁹ *Id.* at 32, line 20 to 33, line 1. See also Ex. 21.

²⁰ *Id.* at 114, lines 16-19.

²¹ *Id.* at 114, line 20 to 115, line 12.

²² *Id.* at 123, lines 12-23.

ber of the Medical School faculty.²³ The Court finds that, at the time of his testimony in this case, Dr. Done was no longer on the faculty of the Medical School, and knew that this was so. The Court rejects as incredible Dr. Done's testimony as the hearing that, at the time he testified at the trial of this case, he believed he was still a faculty member.²⁴ The Court rejects this testimony for the following reasons:

(a) The Court had an opportunity to hear Dr. Done's testimony and to observe his demeanor on the witness stand, and finds that he was not a credible witness;²⁵

²³ Ex. 1 at 534-536; 909-912; 1018-1019. At the hearing, Dr. Done acknowledged that "the presence of a faculty appointment and all that went with it" was important to him, and that he no longer had such an appointment when he testified at the trial of this case in May 1983. Tr. 1/21/87 at 63, lines 15-20. He also acknowledged having testified in another case that a faculty appointment was one of the most important determinants of one's expertise in a particular field. Ex. 19 at 41, line 17 to 43, line 20.

²⁴ Tr. 1/20/87 at 76, line 11 to 77, line 8; 79, lines 9-14. Tr. 1/21/87 at 153, lines 4-11. The Court observes that, even if this testimony were true, Dr. Done nevertheless failed to give the trial court and jury an accurate description of his status at the Medical School. At the hearing, Dr. Done acknowledged this. Tr. 1/21/87 at 204, line 15 to 205, line 14; 206, lines 2-22.

²⁵ In evaluating Dr. Done's credibility, the Court has considered testimony given by Dr. Done in other proceedings since May 1983 in which he has explained his departure from the Medical School and his activities since then. At the hearing, Dr. Done acknowledged giving this testimony, which has often included false and inconsistent explanations. For example, on three occasions since May 1983 and prior to the hearing, Dr. Done has testified falsely that his departure from the Medical School was initially a leave of absence. Ex. 15 at 20, lines 5-11; Ex. 32 at 13, lines 17-23; Ex. 18 at 859, lines 14-19. In fact, at the hearing in this matter, he reiterated this testimony. Tr. 1/21/87 at 47, lines 8-14. On nine other occasions, however, Dr. Done has testified that his departure began with his resignation. Ex. 16 at 43, lines 7-24; Ex. 12 at 4, lines 19-25; Ex. 13 (November 7, 1983) at 150, lines 3-15; Ex. 17 at 186, lines 1-23; Ex. 36 at 236, lines 6-7; Ex. 33 at 117, lines 6-11; Ex. 38 at 4, line 17 to 5, line 1; Ex. 19 at 222, line 17 to 223,

(b) The Court had an opportunity to hear Dean Nadler's testimony and to observe his demeanor on the witness stand, and finds that he was a credible witness. The Court believes Dean Nadler's testimony that Dr. Done was not a member of the Medical School faculty of May 9, 1983 or on any date thereafter.²⁶ The Court believes Dean Nadler's testimony that he met with Dr. Done in early 1983, informed Dr. Done of his dissatisfaction with his performance as a faculty member, and advised Dr. Done that if he did not resign, the Medical School would initiate proceedings to remove his tenure.²⁷ At the hearing, and in an affidavit filed with the Dis-

line 16; Ex. 14 at 48, lines 2-8. At the hearing, he reiterated this testimony also. Tr. 1/20/87 at 58, lines 2-20. At no time has Dr. Done testified that the Dean asked him to resign. At no time has he testified about the criticisms of Drs. Fleischmann, Marks, and Kauffman, the reassignment of his laboratory, his removal as Division Director, or his removal as Chairman of the Formulary Committee. In fact, he has expressly and falsely denied having been criticized by his superiors prior to his resignation (Ex. 13 (November 7, 1983) at 150, line 22 to 151, line 24; Ex. 16 at 143, lines 7-19), and has testified that, prior to his resignation, he had no problem meeting his faculty commitments. Ex. 36 at 240, lines 10-22. He has falsely testified that, prior to his resignation, he was engaged in laboratory research. Ex. 16 at 43, lines 20-24. He has falsely testified that, subsequent to his resignation, he was still seeing patients at Children's Hospital. Ex. 13 (November 8, 1983) at 147, line 23 to 148, line 7. On other occasions, however, he has testified that he has not had any patients of his own or a pediatrics practice of any kind since his resignation. Ex. 38 at 4, line 21 to 5, line 1; Ex. 39 at 1617, lines 8-15. Dr. Done has testified that he considered himself an epidemiologist (Ex. 13 (November 7, 1983) at 159, lines 22-23), but has also testified that he was not an epidemiologist. Ex. 37 at 12, lines 3-4; Ex. 39 at 1616, lines 3-13. Contrary to his trial testimony in the present case, Dr. Done has twice testified that he did not hold himself out as an expert in teratology. Ex. 30 at 32, lines 4-10; Ex. 39 at 1616, line 25 to 1617, line 7.

²⁶ Tr. 1/22/87 at 36, lines 2-7.

²⁷ *Id.* at 13, line 2 to 14, line 4; 21, line 12 to 22, line 18; 23, line 5 to 24, line 20; 26, lines 3-25.

trict of Columbia Court of Appeals, Dr. Done denied that such a meeting ever took place.²⁸

(c) Because of Dr. Done's (1) removal as Director of the Division of Clinical Pharmacology, Toxicology; (2) removal as Chairman of the Formulary Committee and subsequently, as a member of the committee; (3) loss of laboratory space which was reassigned to another faculty member; (4) receipt of Dr. Fleischmann's letters in January and April 1983 expressing concern about his lack of performance; (5) discussions with Dr. Kauffman, in which he was criticized for his failure to fulfill his responsibilities as a Medical School faculty member; (6) meeting with Dean Nadler, in which he was informed that the Medical School would initiate tenure removal proceedings if he did not resign; and (7) submission of a letter of resignation dated April 24, 1983 requesting termination effective within six days, Dr. Done could entertain no reasonable doubt that his resignation was sought, welcomed, would be promptly accepted, and was in effect before he testified at the trial of this case beginning May 9, 1983.

(d) Dean Nadler testified that his letter accepting Dr. Done's resignation was sent to Dr. Done's office at Children's Hospital on April 29, 1983 via inter-office mail.²⁹ Dr. Done testified that, at that time, he had a secretary and that he went to his office after April 29, 1983 and before May 8, 1983, when he came to the District of Columbia to testify in this case.³⁰ The Court finds incredible Dr. Done's testimony that he was not aware that Dean Nadler had sent him a written acceptance of his resignation prior to his testimony at the trial of this case.³¹

²⁸ Tr. 1/20/87 at 73, line 24 to 74, line 22. See also Ex. 3.

²⁹ Tr. 1/22/87 at 64, line 5 to 65, line 14.

³⁰ Tr. 1/20/87 at 72, lines 2-3; 87, lines 22-23.

³¹ *Id.* at 71, lines 9-21. At the hearing, Dr. Done acknowledged that he expected Dean Nadler to accept his resignation and that

21. Dr. Done knowingly and intentionally testified falsely at the trial of this case when he stated he was presently Chairman of the Formulary Committee at Children's Hospital.³² The Court rejects as incredible Dr. Done's explanation that he did not so testify and that his testimony was in the past tense but was transcribed inaccurately in the present tense.³³ Although there exists no tape recording of his trial testimony, the Court observes that the trial transcript indicates that Dr. Done twice referred to his position on the Formulary Committee in the present tense, first stating "I am chairman . . .", and subsequently stating "I don't have the ability to make anything other than a recommendation to the chairman of their committee."³⁴ The Court further observes that on September 22, 1983, in a deposition taken in the case of *Grahovac v. Victory Memorial Hospital* (No. 82 L 467, Circuit Court, Lake County, Illinois), Dr. Done testified he was presently a member of the Formulary Committee.³⁵ This testimony was false, and undermines Dr. Done's explanation for the apparent falsity of his trial testimony in the present case.³⁶

he believed that ratification by the University Board of Governors was a mere formality. Tr. 1/21/87 at 202, lines 14-21. Dean Nadler testified that, in fact, the Board neither ratifies nor approves the resignation of a tenured faculty member; the resignation is merely reported to them. Tr. 1/22/87 at 34, lines 14-24.

³² Ex. 1 at 912, lines 10-12. At the hearing, Dr. Done testified that the Formulary Committee makes important decisions on whether particular drugs should be made available to patients at Children's Hospital. Tr. 1/21/87 at 6, lines 1-16.

³³ Tr. 1/20/87 at 113, lines 17-24. Tr. 1/21/87 at 7, lines 3-8; 9, lines 2-6.

³⁴ Ex. 1 at 912, lines 10-11 (emphasis supplied); 913, lines 8-9 (emphasis supplied).

³⁵ Ex. 32 at 13, lines 8-20.

³⁶ At the hearing, Dr. Done acknowledged that it was possible that he really said what appeared in the transcript, but didn't mean it. Tr. 1/21/87 at 175, lines 11-23.

22. Dr. Done knowingly and intentionally testified falsely at the trial of this case when he stated that he was presently responsible for a fully-staffed laboratory at Children's Hospital which conducted ongoing research at his request and direction.³⁷

23. Dr. Done knowingly and intentionally testified falsely at the trial of this case when he stated that he was presently responsible for the care and treatment of patients.³⁸

24. Dr. Done knowingly and intentionally testified falsely at the trial of this case when he stated that he was a Professor of Pharmacology and Toxicology at the Medical School.³⁹ At the hearing, Dr. Done acknowledged that no such faculty rank existed at the Medical School.⁴⁰

³⁷ Ex. 1 at 1019, lines 14-20. At the hearing, Dr. Done acknowledged that, in the two years preceding his resignation, he did not have a laboratory at Children's Hospital dedicated solely to his work. Tr. 1/21/87 at 13, lines 17-22. He further acknowledged that, during this period, he conducted no research projects at any laboratory at Children's Hospital. *Id.* at 14, lines 20-25.

³⁸ Ex. 1 at 1018, line 8 to 1019, line 10. At the hearing, Dr. Done gave conflicting testimony regarding his treatment of patients at Children's Hospital subsequent to his resignation. On the first day of the hearing, Dr. Done testified that, after he resigned, he never returned to the Medical School, except to clean out his office (Tr. 1/20/87 at 79, lines 18-21), and that he never saw another patient at Children's Hospital. *Id.* at 84, lines 4-9. On the second day of the hearing, however, Dr. Done testified that he saw patients at Children's Hospital after his resignation. Tr. 1/21/87 at 21, line 14 to 22, line 20.

³⁹ Ex. 1 at 536, lines 2-8.

⁴⁰ Tr. 1/21/87 at 29, lines 9-11; 33, lines 7-10. At the hearing, Dr. Done acknowledged that toxicology was an important aspect of his testimony at the trial of this case, and that it was important to him that the jury believe that he was as knowledgeable and well-respected as one could be in the field of toxicology. *Id.* at 29, lines 12-23. Dr. Done further acknowledged, however, that on five other occasions since May 1983, he has correctly referred to his former

Dean Nadler also testified that no such faculty rank existed.⁴¹

25. Dr. Done implied at the trial of this case that he was an expert in teratology and epidemiology.⁴² At the hearing, Dr. Done admitted that he was not an expert in teratology and epidemiology.⁴³

26. Dr. Done's affidavit of June 6, 1986, in which he swore that all of his trial testimony in this case was accurate, was false.

*Findings of Fact Relating to Knowledge
of Plaintiff's Counsel*

27. Barry J. Nace, Esq., and his associate, Thomas H. Tate, Esq., worked together closely in representing plaintiff at trial and in all post-trial and appellate proceedings in this case.⁴⁴

28. Mr. Tate shared with Mr. Nace all significant information that he received in connection with this case.⁴⁵

29. In connection with their representation of plaintiff Mr. Nace and Mr. Tate retained Dr. Alan K. Done to

faculty rank at the Medical School as Professor of Pediatrics and Pharmacology. *Id.* at 29, line 24 to 33, line 14. See also Ex. 13 (November 7, 1983) at 150, lines 3-5; Ex. 14. at 48, lines 2-4; Ex. 15 at 19, line 23 to 20, line 1; Ex. 18 at 859, lines 14-16; Ex. 36 at 235, lines 17-20.

⁴¹ Tr. 1/11/87 at 36, lines 8-21.

⁴² Ex. 1 at 544, line 18 to 546, line 4; 550, line 8 to 551, line 6; 555, line 10 to 556, line 25.

⁴³ Tr. 1/21/87 at 36, line 24 to 37, line 1 (teratology); 40, line 23 to 41, line 8 (epidemiology).

⁴⁴ Transcript of proceedings of the afternoon of January 23, 1987 ("Tr. 1/23/87, P.M.") at 32, lines 10-18.

⁴⁵ *Id.* at 52, line 17 to 53, line 16.

provide expert testimony that defendant's product, Benadryl, caused or contributed to plaintiff's birth defects.⁴⁶

30. Mr. Tate has been acquainted with Dr. Done since 1979, and, prior to his association with Mr. Nace, worked on two other cases in which Dr. Done was retained as an expert witness.⁴⁷ Mr. Tate and Dr. Done were friends arising from their professional relationship.⁴⁸

31. On August 2, 1982, plaintiff filed a Rule 26(b) (4) statement in this case, naming Dr. Done as her expert witness and listing him by his address at Children's Hospital.⁴⁹

32. On August 2, 1983, Mr. Nace and Mr. Tate filed a Rule 26(b) (4) statement in the case of *Charles Benjamin v. Howard University Hospital* (C.A. No. 13725-81, Superior Court of the District of Columbia). In it, they named Dr. Done as their causation expert, and listed his address as 2195 West Maple Road, Birmingham, Michigan 48009, which was Dr. Done's home address at that time.⁵⁰

33. On or about October 2, 1983, in preparing for Dr. Done's deposition in the *Benjamin* case, Dr. Done and Mr. Tate had a conversation in which Mr. Tate learned that

⁴⁶ Ex. 55. From the record before it, and based on its observation of the persons involved, the Court concludes that in 1983, Dr. Done was a sophisticated professional witness and that Messrs. Nace and Tate were experienced trial counsel.

⁴⁷ Tr. 1/23/87, P.M. at 12, line 22 to 13, line 24. Since his association with Mr. Nace, Mr. Tate has worked with Mr. Nace on two cases, in addition to the present case, in which Dr. Done was retained as an expert witness. These cases were *Charles Benjamin v. Howard University Hospital* (C.A. No. 13725-81, Superior Court of the District of Columbia) (See Ex. 12) and *Carita Richardson v. Richardson-Merrell, Inc.* (C.A. No. 83-3505, United States District Court for the District of Columbia) (See Ex. 40).

⁴⁸ Tr. 1/23/87, P.M. at 14, lines 18-20; 44, lines 13-15.

⁴⁹ Ex. 55.

⁵⁰ Ex. 27.

Dr. Done had left the Wayne State University Medical School.⁵¹

34. Mr. Tate apprised Mr. Nace of the substance of his October 2, 1983 discussion with Dr. Done about Dr. Done's departure from the faculty of the Medical School.⁵²

35. On October 3, 1983, Mr. Tate was present at Dr. Done's deposition in the *Benjamin* case. Dr. Done testified that he had departed from the faculty of the Medical School in May 1983.⁵³

36. On May 29, 1984, Mr. Nace and Mr. Tate filed a Brief For Appellant with the District of Columbia Court of Appeals in this case, in which they said that Dr. Done "has been a full professor of pharmacology and toxicology since the mid-1960's and has been a professor of pediatrics and pharmacology both at Wayne State University and the University of Utah."⁵⁴ The brief referred the Court to trial transcript pages 534-536, where Dr. Done falsely testified that he was presently a member of the Medical School faculty on May 9, 1983.⁵⁵ The brief stated that Dr. Done's background, experience and expertise were unchallenged without voir dire by Merrell's counsel."⁵⁶

37. On June 6, 1986, Dr. Done executed an affidavit in which he swore that his testimony at the trial of this case was accurate.⁵⁷ Mr. Nace assisted Dr. Done in the

⁵¹ Tr. 1/23/87, P.M. at 38, line 22 to 39, line 20.

⁵² *Id.* at 42, line 4-14.

⁵³ *Id.* at 18, line 3 to 19, line 22. See also Ex. 12 at 4, line 19 to 5, line 5.

⁵⁴ Ex. 23 at 7, footnote 3.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ Ex. 3.

preparation of this affidavit.⁵⁸ It was filed by Mr. Nace and Mr. Tate with the District of Columbia Court of Appeals as Exhibit 1 to the Response Of Plaintiff-Appellant To Merrell Dow's Motion To Stay Deliberations As To Petition For Rehearing En Banc, etc. In that Response, signed by Mr. Nace, counsel asserted *inter alia* that Dr. Done's "qualifications were not challenged" at trial.⁵⁹

38. On June 10, 1986, Mr. Tate executed an affidavit in which he swore that he had not been aware, until the week preceding the execution of his affidavit, of the exact or approximate date of Dr. Done's resignation from the faculty of the Medical School.⁶⁰

39. The court has found through the inspection of documents in camera that communication between Messrs. Tate and Nace and Dr. Done contained nothing that relates to or reflects knowledge of Messrs. Tate or Nace about Dr. Done's affiliation with or departure from the Wayne State University Medical School prior to the *Oxendine* trial.⁶¹

*Findings of Fact Relating to Knowledge of
Defendant's Counsel*

40. The *Oxendine* trial commenced on Monday, May 2, 1983 and concluded with a 12-person unanimous jury verdict on behalf of the minor plaintiff on May 27, 1983.⁶²

41. On May 27, 1983, defendant through its counsel learned that Dr. Done was no longer affiliated with Wayne State University Medical School.⁶³

⁵⁸ Tr. 1/21/87 at 18, line 9 to 19, line 14.

⁵⁹ See Response of Plaintiff-Appellant to Merrell Dow's Motion To Stay Deliberations As To Petition For Rehearing En Banc, etc., at 4.

⁶⁰ Ex. 26.

⁶¹ Court letter dated December 18, 1986.

⁶² Court file.

⁶³ Defendant's Answers to Interrogatories, 12/12/86, No. 1.

42. Between May 27, 1983 and September 1, 1983, a period of more than three (3) months, defendant had a verdict and judgment rendered against it in this case.⁶⁴

43. On October 5, 1983 defendant learned that Dr. Done's departure from Wayne State University had occurred prior to his testimony in this case on May 9, 1983.⁶⁵

44. Not until the Court of Appeals of the District of Columbia re-instated the minor plaintiff's jury verdict in March of 1986 did the defendant attempt to learn why Dr. Done resigned from Wayne State University.⁶⁶

45. Defendant did not ask the trial court to grant it a new trial for any reason associated with the fact that Dr. Done had resigned from Wayne State University until subsequent to the Court of Appeals decision.⁶⁷

46. Defendant did not ask the Court of Appeals to remand its case to the trial court, nor advise that court of defendant's knowledge that Dr. Done had left Wayne State University, until after the Court of Appeals had rendered its decision adverse to defendant.

/s/ Peter H. Wolf
PETER H. WOLF
Judge

Date: Feb. 11, 1988

⁶⁴ Court file.

⁶⁵ Defendant's Answers to Interrogatories, 12/12/86, No. 1.

⁶⁶ *Id.*

⁶⁷ Judicial Notice, Tr. 2/6/87, p. 63.

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APPENDIX C

SUPERIOR COURT OF THE
DISTRICT OF COLUMBIA
Civil Division

C.A. No. 1245-82

Civil I—Judge Wolf

MARY VIRGINIA OXENDINE,

Plaintiff

v.

MERRELL DOW PHARMACEUTICALS, INC.,

Defendant

MEMORANDUM ORDER

This matter came before the undersigned judge in the Fall of 1986 well after the decision by the District of Columbia Court of Appeals on March 25, 1986 reversing Judge Hannon's judgment notwithstanding the verdict in favor of the plaintiff. *Oxendine v. Merrell Dow Pharmaceuticals, Inc.*, 506 A.2d 1100. While a petition for rehearing *en banc* was pending this court agreed at the request of defendant to allow discovery and hear testimony on the alleged perjury of plaintiff's sole causation expert witness at trial, Dr. Alan K. Done. Judge Hannon had recused himself and the case was assigned to this judge's Civil I calendar.

Testimony was heard and exhibits received on January 20-23 and February 6, 1987. Briefing was scheduled and after its receipt this court issued a Memorandum Order on April 6, 1987. That order required the defendant first to seek relief in the Court of Appeals. That relief was

denied by the Court of Appeals and rehearing *en banc* denied on September 3, 1987. Thereafter defendant renewed its request by filing a Motion for Relief Pursuant to Rule 60 (b) on September 18, 1987. That motion is decided herewith. In addition, plaintiff filed a Motion for a Rule 54 (b) Certificate on September 25, and a Motion to Supplement the Record on October 7, 1987. All motions have been opposed or otherwise responded to, and replies have also been filed. On today's date this court has issued Findings of Fact Relevant to Defendant's Motion for Relief Pursuant to Rule 60 (b). It is upon those findings of fact that this Memorandum Order is based.

The court concludes that the sole remedy for defendant, and defendant does not disagree, is under Civil Rule 60(b). Defendant argues, incorporated from previous pleadings, that the court may grant relief under Rule 60(b) (3)—fraud by an adverse party—because of conduct of plaintiff's attorneys. The court disagrees. The conduct, circumstances, timing, and knowledge of plaintiff's counsel described in the court's Findings of Fact paragraphs 27 through 39 clearly do not add up to *actual* knowledge by plaintiff's counsel of Dr. Done's false testimony. Nor does the court believe from those circumstances that plaintiff's counsel *should* have known of Dr. Done's situation or that they had a duty to inquire further or that they affirmatively *misled* this court or the Court of Appeals.

Accordingly, defendant's request is relegated to Rule 60(b) (6)—“any other reason justifying relief from the operation of the judgment.” For this ground of relief plaintiff claims defendant is too late. A request for relief under this subsection must be made within a reasonable time. Plaintiff argues that defendant's attorneys had a duty to inquire into the circumstances of Dr. Done's departure from the Wayne State Medical School as early as May 27, 1983 when counsel first learned Dr. Done was no longer affiliated with the school. Again the court

finds counsel (but this time, defendant's counsel) had no actual knowledge, nor should have known, nor had a duty to inquire about the circumstances of Dr. Done's departure from the Medical School. Moreover, because defendant was the legal victor in the case from September 1, 1983, when Judge Hannon granted its request for a judgment notwithstanding the verdict, there was no judgment against it from which to seek relief. When such an adverse judgment did come about by the Court of Appeals' decision, defendant's counsel did make inquiries, learned the circumstances of Dr. Done's departure from the Medical School within a reasonable time, and seasonably filed a motion with the Court of Appeals which led to these post-judgment proceedings in this court. See Findings of Fact paragraphs 40 through 46. The court rules that defendant's request for relief has been timely sought under Rule 60(b)-(6).

We then reach the crucial question whether this court's findings about Dr. Done, paragraphs 1 through 26, justify defendant's 60 (b) (6) request for the extraordinary relief of a new trial after an appellate decision on the merits and almost five years after the original trial. The court concludes that the answer must be yes, a new trial is justified. The court believes there is a substantial danger that there was an unjust result that can be attributed to Dr. Done's false testimony about his credentials. See *Metlyn Realty Corp. v. Esmark, Inc.*, 763 F.2d 826, 832 (7th Cir. 1985); *Harre v. A. H. Robins Co.*, 750 F.2d 1501, 1503 (11th Cir. 1985); *Trapp v. American Trading and Production Corp.*, 414 N.Y.S. 2d 11, 13 (App. Div. 1979).-

The court has found that Dr. Done lied in several respects. Findings paragraphs 20 through 26. The court finds that his testimony was so deliberately false that *all* his testimony on behalf of plaintiff is suspect. His lies went so much toward enhancing his status as a witness that he reeks of the hired gun who will say anything

that money can buy so long as it is glibly consistent with his prior testimony in other cases. In a proverbial spiral his professional witness status led him to shirk his duties at the Wayne State Medical School. That got him fired (gently, by a forced resignation). The true circumstances of that resignation detracted from his professional witness status, and so he covered it up with lies to maintain his purported status.

These problems are only exacerbated by the crucial, yet weak, nature of Dr. Done's testimony in this case. As aforesaid, he was plaintiff's only causation witness directly linking Benedectin to the minor child's deformities. But even more important, his substantive testimony herein may be described as creating a preponderance of more than 50 percent by aggregating parts that added up to less than 50 percent. The Court of Appeals itself, though reversing Judge Hannon who had found this logic insufficient upon presiding for three weeks over the trial herein (and for whom this judge has the greatest respect), admitted that Dr. Done's testimony about structure-activity information, *in vivo* studies, *in vitro* studies, and epidemiological studies "showed little or nothing when viewed separately from one another, but they combined to produce a whole that was greater than the sum of its parts." 506 A.2d at 1110. The court went on to state that "The evidence also established that Dr. Done's methodology was generally accepted in the field of teratology, and his qualifications as an expert have not been challenged." But it was Dr. Done *himself* that testified that his methodology produced his unique conclusions and his qualifications have now been timely challenged.

Indeed another respected court has granted a judgment notwithstanding the verdict in "a virtual reprise of Oxendine." *Richardson v. Richardson-Merrell, Inc.*, 649 F. Supp. 799 (D.D.C. 1986) (Jackson, J.). It found that Dr. Done's opinions are simply contrary to the "now nearly universal scientific consensus that Benedectin has

not been shown to be a teratogen, and, the issue being a scientific one, reasonable jurors could not reject that consensus without indulging in" impermissible conjecture. *Id.* at 803. The court is unimpressed with plaintiff's arguments that a new trial should not be granted because there have been other plaintiffs' victories against defendant, other times Dr. Done has still qualified as an expert, and times when his history at Wayne State University Medical School has not been brought out even though known by defendant's attorneys. Just as forcefully there have been times when his testimony has been impeached, as it was in the post-trial proceedings herein, and defense verdicts have resulted. The point is that his testimony was crucial, that his testimony is of doubtful logic (even though sustained by the District of Columbia Court of Appeals in this very case), and that it is a profoundly minority view within the scientific community. It was also testimony that, it now turns out, grossly misrepresented his standing in the educational community. In a close case, with its own trial dynamics, there is a substantial danger that that distortion was the crucial difference. To avoid such an unjust result a new trial is warranted.

Accordingly, it is this 11th day of February 1988
ORDERED:

1. That plaintiff's Motion to Supplement the Record is hereby GRANTED.
2. That defendant's Motion for Relief Pursuant to Rule 60 (b) is GRANTED, and a new trial is ordered herein.
3. That plaintiff's Motion for a Rule 54 (b) Certificate is DENIED as MOOT.
4. That on or before Monday, March 7, 1988, plaintiff may petition this court under D.C. Code § 11-721 (d) (1981) for certification of the new trial decision herein

for interlocutory appeal. Defendant shall reply thereto on or before Monday, March 21, 1988.

/s/ **Peter H. Wolf**
PETER H. WOLF
Judge

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APPENDIX D**SUPERIOR COURT OF THE
DISTRICT OF COLUMBIA
Civil Division**

C.A. No. 1245-82

Civil I—Judge Wolf

MARY VIRGINIA OXENDINE,

Plaintiff

v.

MERRELL DOW PHARMACEUTICALS, INC.,

Defendant

ORDER

The court has before it plaintiff's Motion for Reconsideration and to Amend Findings of Fact and Strike Certain Findings of Fact, plaintiffs supplement to the motion, defendant's opposition thereto, and plaintiff's reply thereto.

The court does not believe that oral argument on the motion is necessary.

Plaintiff's motion argues, with much unbecoming and unhelpful hyperbole, that no findings of fact by the court on February 11, 1988 accurately depict Dr. Done's qualifications, the cases cited by the court are irrelevant, the court's references to the record do not support its findings, and the court's decision is wrong and unfair. Plaintiff also asserts that the findings of fact paragraphs 27-38 place plaintiff's counsel in bad light and should be struck or, in the alternative, amended to include plaintiff's counsel's credentials.

First, the court found it unnecessary to include Dr. Done's resume in its findings of fact; his credentials are contained in the trial and hearing transcripts and not related to the issues before the court.

Second, the cases cited by the court are not irrelevant. In *Trapp v. American Trading and Production Corp.*, 414 N.Y.S. 2d 11 (App. Div. 1979), an expert witness perjured himself about his credentials and a new trial was granted. Perjury is still perjury whether it encompasses his entire credentials or whether it is just "a little perjury." The jury is misled and the expert's status is enhanced. In *Harre v. A.H. Robins*, 750 F.2d 1501, 1503 (11th Cir. 1985), an expert witness committed perjury on the central issue in the case, the "wicking" of the Dalkon Shield. Dr. Done's perjury was not about the substantive issue in the case. However, as the plaintiff's *only* causation witness, his testimony and credibility were a central issue at trial, especially when his research and theories are not within the mainstream of the scientific community. In *Metlyn Realty Corp. v. Eswark, Inc.*, 763 F.2d 826 (7th Cir. 1985), an expert exaggerated his credentials for a settlement hearing; the District Court refused to open the case because the misrepresentations had not affected the court's decision to approve the settlement. Unfortunately, the court in this case cannot turn back the clock to know with absolute certainty how Dr. Done's perjury might or might not have affected the jury. *Metlyn* illustrates that exaggerated credentials are an issue for a new trial and this court believes the circumstances are such that a new trial would unmistakably come closer to the truth. *Metlyn Realty Corp.*, 763 F.2d at 832-33.

Third, the court has reviewed the record concerning Dr. Done's faculty status, the formulary committee, a fully staffed laboratory, attending patients, and pharmacology/toxicology professor status. The court is not persuaded by plaintiff's arguments or interpretations of the facts; the court's opinion is thoroughly supported in the record.

Finally, plaintiffs assert that in paragraphs 27-38 of the court's findings of fact, counsel for plaintiff "are placed in a bad light." The court attempted only to make such findings as would be necessary to address the arguments made by both parties in the case. Findings 27-38 are no less necessary in that regard than are findings 40-46 about defendant and its counsel. Moreover, various paragraphs among paragraphs 27-38 were substantially based upon plaintiff's own submission of proposed findings of fact. Cf. plaintiff's proposed findings of fact paragraphs 1-10. Plaintiff's counsel also assert that their credentials should be added to the findings of fact. Although plaintiff's counsel's credentials are extensive, they are no more relevant and material to the issues at hand than the credentials of defendant's counsel. The court's findings represent the necessary facts to support its opinion and issues that may be addressed on appeal.

Accordingly, it is this 28th day of March 1988

ORDERED that, plaintiff's Motion for Reconsideration is hereby GRANTED; however, the court's prior order and findings are REAFFIRMED in all respects.

/s/ Peter H. Wolf
PETER H. WOLF
Judge

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APPENDIX E

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 83-1055

MARY VIRGINIA OXENDINE,
Appellant,
v.

MERRELL DOW PHARMACEUTICALS, INC.,
Appellee.

Argued Feb. 5, 1985

Decided March 25, 1986

As amended June 2, 1986

Barry J. Nace, with whom Thomas H. Tate, Washington, D.C., was on brief, for appellant.

Sidney G. Leech, with whom Daniel W. Whitney, Baltimore, Md., and Mark L. Austrian, were on brief, for appellee.

Jeffrey Robert White, Washington, D.C., David S. Shrager, Philadelphia, Pa., Robert Cadeaux, and Jacob A. Stein, Washington, D.C., filed a brief for amici curiae, Ass'n of Trial Lawyers of America and Ass'n of Plaintiffs' Trial Attys. of Metropolitan Washington.

Before PRYOR, Chief Judge, TERRY, Associate Judge, and PAIR, Senior Judge.

TERRY, Associate Judge:

In this product liability case, appellant seeks reversal of an order of the trial court setting aside a jury ver-

dict in her favor. She contends that there was sufficient evidence to send the case to the jury, and that the court therefore erred in entering a judgment notwithstanding the verdict. In addition, she argues that the court abused its discretion by ordering a new trial in the alternative because the verdict was not against the great weight of the evidence. We agree with both contentions, reverse the judgment, and remand the case with directions to reinstate the verdict and proceed to trial on appellant's claim for punitive damages, which has not yet been tried.¹

I

On January 25, 1971, appellant was born with a shortened right forearm and only three fingers on her right hand. Those fingers were fused together.

Appellant, through her parents, filed a complaint in the Superior Court on February 1, 1982, alleging that her birth defects were caused by her mother's use during pregnancy of a prescription drug manufactured by appellee. The drug, known as Bendectin, was designed to alleviate the nausea which commonly accompanies pregnancy. The complaint stated five counts against appellee, alleging negligence, breach of express warranty, breach of implied warranty, strict liability, and misbranding under the Federal Food, Drug, and Cosmetic Act. It sought ten million dollars in compensatory damages and ten million dollars in punitive damages.²

After hearing the testimony of eighteen witnesses in the course of a three-week trial, the jury awarded appellee

¹ By a pretrial order, the court ruled that the claims for compensatory and punitive damages would be tried separately.

² Appellant's complaint included an additional claim against the Upjohn Company because her mother had also taken Provera, a prescription drug manufactured by Upjohn to prevent miscarriages. This claim, however, was settled before trial, and Upjohn dropped out of the case.

lant \$750,000 in compensatory damages. Appellee then filed a motion for judgment notwithstanding the verdict or, in the alternative, for a new trial. The trial court granted both parts of the motion after a hearing, stating in an order the basis of its decision:

In support of her case to establish proximate cause, plaintiff relies on four principal grounds. The first is the structural activity of Bendectin which included an antihistaminic component, together with the awareness that certain antihistamines have been determined to be teratogenic in certain animals. Plaintiff also relies on the animal or *in vivo* studies. The third ground involves the *in vitro* studies performed at the National Institutes of Health. Finally, plaintiff relies on human epidemiological data.

It is clear to the Court from review of the evidence adduced at the trial of this action that no conclusion one way or another can be drawn from any of the above relied upon bases, respecting whether Bendectin is a human teratogen. And it is also clear from the evidence that plaintiff has failed to prove that use of Bendectin by her mother proximately caused her birth defect.

This appeal followed.

II

A judgment notwithstanding the verdict is proper only in "extreme" cases, in which no reasonable person, viewing the evidence in the light most favorable to the prevailing party, could reach a verdict in favor of that party. *District of Columbia v. Cooper*, 445 A.2d 652, 655 (D.C.1982) (en banc); accord, e.g., *Lewis v. Washington Metropolitan Area Transit Authority*, 463 A.2d 666, 669 (D.C.1983) ("Where the evidence is such that reasonable persons could differ, the issue is properly put before the jury"); *Washington Metropolitan Area Transit Authority v. Jones*, 443 A.2d 45, 49 (D.C.1982) (en banc). We

have often stressed that cases "in which only one conclusion reasonably could be drawn from the evidence, and in which negligence . . . and proximate cause will not be questions of fact for the jury," are "unusual" cases. *Rich v. District of Columbia*, 410 A.2d 528, 532 (D.C.1979) (citations omitted); see *District of Columbia v. Cooper, supra*, 445 A.2d at 655 n. 3. On appeal, this court must apply the same standard as the trial court. See *District of Columbia v. Cassidy*, 465 A.2d 395, 397 (D.C.1983); *Faniel v. Chesapeake & Potomac Telephone Co.*, 404 A.2d 147, 150 (D.C.1979). We must be particularly cautious about setting aside jury verdicts in cases, such as this one, which present difficult medical issues of causation, with expert testimony going both ways.

Judges, both trial and appellate, have no special competence to resolve the complex and refractory causal issues raised by the attempt to link low level exposure to toxic chemicals with human disease. On questions such as these, which stand at the frontier of current medical and epidemiological inquiry, if experts are willing to testify that such a link exists, it is for the jury to decide whether to credit such testimony.

Ferebee v. Chevron Co., 237 U.S. App.D.C. 164, 169, 736 F.2d 1529, 1534, cert. denied, — U.S. —, 105 S.Ct. 545, 83 L.Ed.2d 432 (1984).

The transcript of the hearing on the motion for judgment n.o.v. helps to clarify what the trial court meant when it said in its order that "no conclusion" could be drawn from the evidence presented at trial. Dr. Alan Done, appellant's sole causation witness, had testified that no conclusion about Bendectin's effect on humans could be drawn from any of the four types of scientific data upon which he had principally relied when each type was considered separately from the others. The court focused on this fact and concluded that if each type of data,

viewed in isolation, was not sufficient to prove that Bendectin caused birth defects, then all of them taken together could not prove it either. In so ruling, the trial court erred.

III

Dr. Done relied on four kinds of evidence in reaching his conclusion that Bendectin caused appellant's birth defects: (a) structure-activity information, (b) *in vivo* studies, (c) *in vitro* studies, and (d) epidemiological studies. We shall discuss each in turn.³

A. *Structure-activity information*

The first category of data upon which Dr. Done based his opinion involved what he termed the "structure-activity" of Bendectin. He explained that pharmacologists are "frequently able . . . to look at the structure [of a chemical compound] and predict what kind of activity that compound will have. And one of the jobs of pharmacology is to try to find that out, because that is how we design drugs to do certain jobs." Dr. Done said that the type of "activity" or function that a drug performs usually "has a bearing on the issue . . . teratogenicity"; some antihistamines, for example, have been found to have teratogenic effects. One of the three components of Bendectin, doxylamine succinate, is an antihistamine.⁴ Dr. Done testified that it is a known teratogen for some animals and that it is suspected of being a human teratogen as well.

³ Dr. Done testified as an expert in the field of teratology, which is, broadly speaking, the study of birth defects and malformations. The admissibility of Dr. Done's testimony is not at issue in this case. Appellee contests its sufficiency to prove causation, but concedes that it was admissible.

⁴ A single dose of Bendectin contains ten milligrams each of doxylamine succinate, dicyclomine hydrochloride, and pyridoxine hydrochloride.

Appellee correctly states in its brief that “[c]onsidered alone, the structure-activity of Bendectin did not provide a basis for Dr. Done to conclude that Bendectin was a teratogen.” But Dr. Done did not consider it alone, as he made clear before he even began to discuss Bendectin’s structure-activity. On direct examination he was asked, “So you can’t just take the structure by itself and make a determination [as to Bendectin’s teratogenicity]?” He responded, “That’s right. Never can you take one and say it will not be.” On cross-examination he said the same thing. Dr. Done was asked, with regard to “the chemical activity and chemical structures, those alone wouldn’t enable you to reach an opinion on what caused Mary Virginia Oxendine’s birth defect, would they?” He answered, “Not alone, no.”

At the hearing on the motion for judgment n.o.v., however, the court recalled Dr. Done’s testimony on the structure-activity of Bendectin somewhat differently: “he told me that . . . no conclusions can be drawn because Bendectin has an antihistamine in it, and it proved to be teratogenic in animals, yet no conclusions may be drawn, and yet he said, however, that [this information is] helpful.” The court’s recollection of the testimony was unfortunately flawed. Dr. Done did not say that “no conclusions” could be drawn from the structure-activity information. On the contrary, he testified that the information provided a “clue” about Bendectin’s possible teratogenicity, which helped him to reach his final opinion in the case. He specifically said that teratologists generally rely on such data in combination with *in vitro*, *in vivo*, and epidemiological studies in reaching conclusions regarding the teratogenicity of a substance; “the whole collection is what is generally used.”

B. *In vivo* studies

Dr. Done next turned to the *in vivo* (animal) studies relating to Bendectin. He first discussed a study entitled

"Reproductive Study of Offspring of Bendectin-Treated Dams," which was conducted by appellee and reported by a Dr. Staples. The study was designed to discover whether Bendectin would cause birth defects in the offspring of female rabbits. Dr. Done quoted the pertinent findings and conclusions of Dr. Staples:

The limb alterations observed following Bendectin administration to female rabbits during gestation are considered to have been of no consequence in view of the mildness of the change and in view of its presence among the kits of controlled females.

The sternal changes noted involving shifting ossification [bone formation] centers by past experience could point to the possibility of severe alterations should the dosage be increased above the levels employed here.

This is of particular importance in view of the fact that that type of change was noted only at the highest dose administered.

This possibility can be answered only if further experimentation employing increased dosage is conducted. Such experimentation would at least provide additional information concerning the significance of the abortions seen in this study following Bendectin administration to the rabbit.

Dr. Done said that this study raised a "suspicion" of the teratogenicity of Bendectin which could be resolved only by further studies. Because appellee conducted no further studies, Dr. Done concluded that the Staples study must therefore be viewed as "positive."⁵ With regard to the

⁵ Appellee asserts in its brief that further studies were in fact conducted. Those later studies, however, involved a two-ingredient form of Bendectin, whereas appellant's mother took the three-ingredient form. Dr. Done was therefore correct when he said that there were no follow-up studies, at least as to the form of

"sternal changes" which Dr. Staples found, Dr. Done testified that the study could not be viewed as negative because the changes were found only at the highest dose used, which was not the highest dose possible. Teratologists, he said, use doses which fall just short of the amount which would start making the mothers ill. They then look for a dose-response relationship in which the number of effects increases with the dosage. Such a relationship helps to demonstrate that the effect is drug-related. The Staples study, however, was lacking the proper dose levels. Dr. Done also noted that the "abortions" mentioned by Dr. Staples (*i.e.*, spontaneous abortions or miscarriages) could have occurred because "the babies were malformed and therefore couldn't survive."

Although the principal *in vivo* study on which Dr. Done relied was the one reported by Dr. Staples, he testified that two other *in vivo* studies strengthened his opinion that Bendectin is a teratogen. One was conducted by a Dr. Roll to test the effects of doxylamine, one of Bendectin's components, on mice and rats; the other was by a Dr. Hendricks and dealt with the effects of Bendectin on monkeys. Dr. Done did not discuss these studies at length, but he did say that "they showed in my opinion evidence of teratogenicity in those particular species and that would just be further evidence of the potential of the drug to produce defects."

As with the other types of scientific data on which he relied, Dr. Done readily acknowledged that he could not conclude that Bendectin was a teratogen on the basis of the *in vivo* studies alone. In this regard he testified on cross-examination:

Bendectin at issue in this case. Even Dr. Raymond Pogge, who created Bendectin for appellee by combining three separate chemicals, conceded that, because of drug interactions, one cannot predict what effect such a combination will have by looking at its individual ingredients; one must study the drug in its combined form in order to determine its effect.

Q. Doctor, the observations of what is happening in people who receive a drug and to their offspring is crucial in getting what in the last analysis is the only meaningful answer whether the drug causes defects in people or not; wouldn't you agree with that?

A. The only definitive answer in terms of absoluteness in humans, yes.

* * * *

Q. Now, any time you have both human studies and animal studies, presuming that they are both properly performed, the human studies would be more valid, more reliable, wouldn't they?

A. Well, it depends on how well performed they are compared to animal studies. In terms of pinning it down to the human being, if the studies are well performed, they would have greater meaning.

* * * *

Q. Now, in studies with human beings as distinguished from studies with animals, it is much more difficult to get perfect controls; is that correct?

A. Yes.

Q. And that is because animals can be kept in the same environment, given the same food and observed very closely; is that correct?

A. That is part of the reason, yes.

Q. You can control their breeding?

A. That's right.

Q. Whereas in human beings, they are much more different, much more difficult to control even if they are on a study; is that correct?

A. That's right.

* * * *

Q. Doctor, isn't it a fact that you cannot determine teratogenicity from animal studies?

A. You can determine teratogenicity in the human being from animal studies.

Q. But there is no direct correlation between the two?

A. Well, there is a direct correlation . . . in the sense that no known human teratogen to my knowledge has failed to be teratogenic in at least one species of experimental animal.

Dr. Done plainly did not state that *in vivo* data are useless, as the trial court apparently believed. Dr. Done acknowledged that, in theory, human studies may be better than animal studies for predicting a drug's effect on humans, but he also pointed out that animal studies have many advantages over human studies because better controls are possible. Moreover, he specifically said that "[y]ou can determine teratogenicity in the human being from animal studies." Dr. Done did concede that "[t]he fact that [a substance] is teratogenic in a species of animal does not necessarily mean that it will be in humans as far as we know." The extent of that concession, however, was simply that one cannot conclude that a drug is a human teratogen on the basis of animal studies *alone*. Dr. Done did not attempt to draw such a conclusion. Even Dr. William Scott, one of appellee's expert witnesses, testified that animal studies must not be considered alone, but in combination with all other available data, to determine the teratogenicity of a substance. That is precisely how Dr. Done arrived at his conclusion that Bendectin was a teratogen, as his testimony made very clear.

— C. *In vitro* studies

Next, Dr. Done turned to the *in vitro* data on the teratogenicity of Bendectin. He explained that *in vitro* means "in glass," and that *in vitro* studies are those which are performed in a test tube. Such studies are particularly valuable, he said, because they allow scientists to focus on a specific effect. For example, to determine whether a drug can cause limb-shortening birth defects, limb bud cells of animal embryos (which eventually form

the limbs of animals) can be separated from the rest of the embryo, placed in a test tube, and watched to see if their development is thwarted by the drug.

Dr. Done relied primarily on an *in vitro* study performed by a Dr. Hassell. In that study Dr. Hassell observed that Bendectin interfered with the growth and development of limb bud cells. This observation led Dr. Done to conclude that the study "clearly indicates the potential for teratogenicity is there with regard to limb defects because the focusing that was done in this instance was to focus down on limb bud cells individually and grow them as pure things in culture. When it could be shown that Bendectin interfered with their growth and development, that, of course, indicates that the potential is there."

Considering the *in vitro* evidence in combination with the other data, Dr. Done testified that in his opinion Bendectin caused appellant's birth defects. Here again, Dr. Scott, appellee's expert witness, testified that *in vitro* studies play a role in the determination of whether a substance is a teratogen. Such evidence, he said, must be considered in light of other available data in reaching an opinion on the teratogenicity of a substance. Dr. Done did not testify otherwise.

D. *Epidemiological studies*

Finally, Dr. Done turned to the epidemiological data. Epidemiology is the study of the frequency of disease in human populations and the way in which that frequency varies from one population to another. Like animal studies, epidemiological data are used to determine whether there is a positive correlation between the use of a substance and the appearance of any subsequent illness.

Dr. Done relied principally on a study conducted by two employees of appellee, Drs. Bunde and Bowles. Their

study analyzed certain data provided by obstetricians in different parts of the United States and Canada concerning 2218 pairs of their women patients. Drs. Bunde and Bowles concluded that these data did not show a statistically significant association between Bendectin and birth defects.

Dr. Done reexamined the same data and came to a different conclusion. Initially he found fault with the methodology used by Drs. Bunde and Bowles, stating that it did not comport with accepted epidemiological standards. He also pointed out that there were inadequate controls because many women in the control group could have been exposed to Bendectin. Since Bendectin can be purchased without a prescription in Canada, the Canadian obstetricians reporting their findings may not have known whether some of the women in the control group had taken it. Dr. Done therefore excluded the Canadian pairs from the data. He also found numerous errors in the raw data and excluded more pairs to deal with those problems.⁶ In the end he calculated that the "relative risk" of the study was between 1.3 and 1.8, depending on whether certain data were Canadian or American. He explained the significance of these figures:

Relative risk just means the likelihood of getting a defective child in this case as a result of an association with the taking of Bendectin as opposed to not taking Bendectin.

1.8 means the woman is 80% more likely or almost twice as likely, in other words, to have a malformed baby if she is in the Bendectin group than in the control group.

⁶ The decision regarding what data to consider and what to exclude is apparently left primarily to the discretion of the expert. In this case data were excluded by both appellant's and appellee's expert witnesses. Although they often disagreed sharply with respect to when it was reasonable to disregard data, they all agreed that it was generally proper to do so.

Or if the figure is correct, 1.3, that means 30% greater likelihood. Whereas before, the original results suggested that she was 40% less likely to have an abnormal baby if she received Bendectin than if she didn't.

Dr. Done testified that the Bunde-Bowles study, taken together with the rest of the available data, supported his conclusion that Bendectin caused appellant's birth defects. He identified more than twenty other epidemiological studies which he had reviewed and analyzed in his own separate study of the literature on Bendectin and its components. He also referred to an internal memorandum of appellee entitled "Bendectin and Congenital Malformations," which reported that 48 percent of all Bendectin-related defects observed in a study were limb defects. Finally, Dr. Done noted that in a memorandum written by an employee of appellee, which was admitted into evidence over appellee's objection, there appears the statement that "Bendectin is not an obligatory teratogen as Thalid[omide] (for example)." Dr. Done explained that an obligatory teratogen is one which almost always causes birth defects, and that the author of this statement would not have made it unless he or she believed that Bendectin was a teratogen, but not as "flagrant" or severe as Thalidomide.⁷

Dr. Done was on the witness stand for three and a half days. His testimony fills almost 600 pages of transcript. Although he was vigorously and exhaustively cross-examined by very able counsel, he did not waver from his opinion that Bendectin had caused appellant's birth defects. Throughout his testimony he repeatedly stated that this opinion was based not on any single study or type of

⁷ Dr. Done also noted that appellant was exposed to Bendectin during the critical period in which her limbs were developing. This made it more likely, he said, that Bendectin caused her birth defects.

evidence, but on four different types of scientific data viewed in combination. He conceded his inability to conclude that Bendectin was a teratogen on the basis of any of the individual studies which he discussed, but he also made clear that all of these studies must be viewed together and that, so viewed, they supported his conclusion. To argue on the basis of his concession, as appellee now does, that there was no factual support for his opinion simply ignores the rest of his testimony.

E. Appellee's evidence

Dr. Brian MacMahon was appellee's principal witness on epidemiology and statistics. He testified that in evaluating the data on which an epidemiological study is based, one must first calculate the "relative risk" of the substance tested. Next, one must determine the "confidence interval" for the study, which sets the range within which the relative risk would fall if the study were repeated many times. Finally, one must look to see if the number "1" falls within the confidence interval. If so, the results of the study are essentially meaningless; if not, the study shows a statistically significant relationship between the substance tested and the effects observed.

Dr. MacMahon then reviewed a number of epidemiological studies on Bendectin. Many of them had a relative risk higher than 1, which meant that the risk of having a baby with a birth defect was higher for those mothers who took Bendectin than those who did not. Nevertheless, Dr. MacMahon believed that these studies were meaningless because the number "1" fell within the confidence interval of each of the studies. He therefore concluded that Bendectin was not responsible for the birth defects observed in the studies and, moreover, that it did not cause appellant's birth defects. Appellee relies principally on Dr. MacMahon's testimony and on similar statements by its other expert witnesses in arguing that causation cannot be established without evidence of a sta-

tistically significant association between Bendectin and birth defects. There are at least three reasons why this argument lacks merit.

First, Dr. MacMahon conceded that there were in fact several studies showing statistically significant associations between Bendectin and various types of birth defects. In a study by a Dr. Cordero, for example, Dr. MacMahon noted that the relative risk for one type of limb reduction effect was statistically significant. The relative risk was 3.88, and the confidence interval did not include the number "1." Other defense witnesses also testified to such statistically significant associations. Therefore, even assuming that a study must be deemed meaningless whenever the number "1" falls within its confidence interval, the jury was made aware of several meaningful studies on which it could base a finding of causation.

Second, appellant's rebuttal witness, Dr. Shanna Swan, an expert in biostatistics and epidemiology, testified that the mere fact that the number "1" falls within the confidence interval does not invalidate the study. She cited as an example an epidemiological study by a Dr. Smithells, in which the confidence interval was from 0.71 to 2.61, and the relative risk was 1.36. Dr. Swan testified that the relative risk calculation is the "best estimate of the true situation based on [these] data. . ." A relative risk of 1.36 means that women who take Bendectin have a 36 percent higher risk of having a baby with a birth defect than those who do not. Confidence intervals, she said, are used to predict the range in which the relative risk would fall if the study were repeated several times. Thus, in the Smithells study, "the data [are] consistent with the relative risk being as high as 2.61," which means that women who took Bendectin would have a 161 percent higher risk of having a baby with a birth defect than those who did not take Bendectin. Dr. Swan's testimony thus contradicted that of Dr. MacMahon on the question of whether many of the studies which he rejected could

be relied upon as evidence that women exposed to Bendectin had a higher risk of giving birth to babies with birth defects. That contradiction was properly left to the jury to resolve.

Finally, Dr. MacMahon conceded that statisticians must be careful to weigh other evidence and not to apply their rules rigidly and blindly. On cross-examination, he agreed with Dr. Byron Brown, whom he recognized as an authority on the subject:

Q. Do you agree with [Dr. Brown], if the scientist is to go further than reporting his set of data, discussing it as fully as possible and relating it to the body of current knowledge, if he is to regard himself as a decision maker, then he must consider more than error rates? Do you agree with that?

A. Yes.

Q. He must weigh past evidence in with the data he has accumulated and he must weigh the penalties or costs involved in making the various types of error. Do you agree with that?

A. Yes

Q. And Doctor, one of the things you have to consider, then, when you come up with your statistics is what happens if you are wrong. You have to consider that risk, don't you, as a biostatistician?

A. Yes.

Q. And if the studies that show a relative risk as Smithells did at 36 percent greater chance of a defect, Mitchell, 50 percent, and the other ones that we referred to were right with that relative risk and you are wrong saying they are statistically insignificant, and Bendectin is in fact a teratogen, then the risk is that children are going to be born with limb defects of mothers who take Bendectin, isn't that right?

A. That's very hypothetical, but yes.

F. Conclusion

Although the trial in this case was long and the evidence complex, the issue before the jury was a straightforward one: did Bendectin cause appellant's birth defects? Expert witnesses testified at length on both sides of that issue. Not surprisingly, their testimony revealed a disagreement as to how the epidemiological and other data should be interpreted. "The case was thus a classic battle of the experts, a battle in which the jury must decide the victor." *Ferebee v. Chevron Chemical Co.*, *supra*, 237 U.S. App. D.C. at 170, 736 F.2d at 1535 (citation omitted). The trial court, however, granted appellee's motion for judgment notwithstanding the verdict on the ground that appellant's causation expert admitted in his testimony that each of the studies on which he relied could not, *by itself*, support a finding of causation. Where the court erred was in failing to consider the same expert's testimony that all of the studies, *taken in combination*, did support such a finding, as he carefully and repeatedly explained.

In ruling on a motion for judgment n.o.v., the court must view the evidence as a whole, not in fragments. Like the pieces of a mosaic, the individual studies showed little or nothing when viewed separately from one another, but they combined to produce a whole that was greater than the sum of its parts: a foundation for Dr. Done's opinion that Bendectin caused appellant's birth defects. The evidence also established that Dr. Done's methodology was generally accepted in the field of teratology, and his qualifications as an expert have not been challenged. Because he fully explained to the jury that his opinion was based on *all* of the studies, we cannot say that no reasonable juror could reach a verdict in favor of appellant. Hence we must reverse the order granting a judgment n.o.v.

IV

Appellant also contends that the court abused its discretion by ordering a new trial in the alternative on the ground that the verdict was against the weight of the evidence. We agree.

A ruling on a motion for new trial is committed to the sound discretion of the trial court and will be reversed on appeal only if that discretion has been abused. *Rich v. District of Columbia, supra*, 410 A.2d at 535; *Johnson v. Bernard*, 388 A.2d 490, 491 (D.C.1978); *Baber v. Buckley*, 322 A.2d 265, 266 (D.C.1974). This discretion is appropriately placed because the trial court, unlike an appellate court, has had an opportunity to see and hear the witnesses at first hand. *Rich v. District of Columbia, supra*, 410 A.2d at 535.

Our scope of review is especially narrow when the trial court has denied a motion for new trial, thereby sustaining the jury's verdict. In such a case, "the trial court's unique opportunity to consider the evidence in the context of a 'living trial' coalesces with the 'deference properly given to the jury's determination of such matters of fact as the weight of the evidence,' so as to favor restricted appellate review." *Id.* (citation omitted). However, "when the jury has exercised its factfinding function, and the trial judge sets that body's decision aside by granting a new trial, the two factors favoring limited review are in opposition, not harmony." *Id.* (citations omitted). In that situation

the judge takes over, if he does not usurp, the prime function of the jury as the trier of the facts. It then becomes the duty of the appellate tribunal to exercise a closer degree of scrutiny and supervision than is the case where a new trial is granted because of some undesirable or pernicious influence obtruding into the trial. Such a close scrutiny is required in order to protect the litigants' right to jury trial.

Lind v. Schenley Industries, Inc., 278 F.2d 79, 90 (3d Cir.), cert. denied, 364 U.S. 835, 81 S.Ct. 58, 5 L.Ed.2d 60 (1960), quoted in *Rich v. District of Columbia, supra*, 410 A.2d at 536. Consequently, when the court has merely reexamined the evidence and reached a decision contrary to that of the jury, we must review the new trial order with great care.

In this case, the trial court granted appellee's alternative motion for new trial on the ground that the "jury verdict [was] against the great weight of the evidence." Although the court did not explain its ruling further, it appears to have been based on the same reasoning that led to the court's flawed ruling on the motion for judgment n.o.v., namely, that Dr. Done's testimony must be discounted because he could not base a finding of teratogenicity on any of the individual studies on which he relied. Having given the court's new trial order the close scrutiny which the case law commands, we are convinced that the court erred in concluding that the verdict was against the weight of the evidence.

Dr. Done testified that on the basis of the structure-activity, *in vivo*, *in vitro*, and epidemiological data, viewed in combination, he had formed an opinion that Bendectin was a teratogen and that it had caused appellant's birth defects. Although appellee put a dozen expert witnesses on the stand, not one of them contradicted Dr. Done's opinion. Several of appellee's experts conceded that Dr. Done's methodology was proper, but not one of them followed it. Not one testified that on the basis of the four types of evidence reviewed by Dr. Done, taken together, Bendectin could not be regarded as a teratogen. Instead, appellee relied almost entirely on the epidemiological data because it believed that Dr. Done had conceded away his case. Appellee reasoned there was no need to refute Dr. Done's testimony because Dr. Done had done that job himself. As appellee states in its brief on appeal:

Appellant contends that no Merrell Dow expert expressed an opinion based upon all of the factors considered by Dr. Done, namely, the "structure activity" of Bendectin, the animal *in vivo* and *in vitro* studies, the human epidemiological data and drug experience reports, and therefore his opinion is somehow unrefuted and unrebutted.

No Merrell Dow expert relied upon all of the so called data Dr. Done relied upon for one simple reason—the basis of this opinion was speculative or nonexistent. By his own testimony Dr. Done conceded away the grounds for his opinion.

Appellee not only failed to refute Dr. Done's opinion directly, but offered little evidence to discredit any of the four bases of that opinion. First, with regard to Dr. Done's structure-activity analysis, appellee called Dr. Frank Palopali, the head of its chemical department. Dr. Palopali sketched the chemical structures of several antihistamines and concluded that they differed. However, he did not contradict Dr. Done's testimony that antihistamines are often teratogens, that Bendectin in fact contains an antihistamine which is a known animal teratogen and a suspected human teratogen, and that such information may be relied upon, in part, as a basis for concluding that Bendectin is a human teratogen.

Second, with respect to the *in vivo* studies, only one of appellee's twelve witnesses, Dr. William Scott, testified about them, and he did so only briefly. When asked whether the Roll study showed that Bendectin had caused birth defects, he simply relied, "No, it did not have any effect." Asked whether eight other *in vivo* studies involving a two-component form of Bendectin showed that it caused birth defects, he responded, "No, they do not." Appellant's counsel objected to this last question on relevancy grounds because appellant's mother had taken Bendectin

in its three-component form, but the court overruled the objection.⁸

Third, with respect to the *in vitro* studies, Dr. Scott was again the only one of appellee's witnesses to say anything on the subject. He testified that one major drawback of *in vitro* testing is that it is done in a static system without live animals. Ordinarily, he said, when a drug is taken by an animal and absorbed into its blood stream, enzymes break the drug down into metabolites, which are excreted. Consequently, the live embryo is exposed to only a fraction of the amount that is given to the animal. Dr. Scott did not explain, however, whether that problem could be resolved by exposing *in vitro* embryos to less of the drug or by reducing the time of their exposure. Moreover, he did not contradict Dr. Done's testimony that *in vitro* tests are better in some ways than *in vivo* tests, especially because they allow scientists to focus on a particular aspect of an animal without any outside interference. Dr. Scott also conceded that *in vitro* tests play a useful role in determining whether a substance is a human teratogen. In addition, Dr. Scott did not refute Dr. Done's conclusions regarding Dr. Hassell's *in vitro* study, and he conceded that the study was done properly. Referring to Dr. Hassell and his study, Dr. Scott testified, "I'm not an expert on that particular technique, but he is, and I would presume that they are done technically correctly."

Finally, with respect to the epidemiological data, appellee called a number of expert witnesses. Dr. MacMahon explained the background necessary to understand his

⁸ Dr. Done had testified earlier that he would not consider the studies of the two-component form because it was different from the three-component form suspected of being a teratogen in this case.⁹ Even Dr. Pogge, the creator of Bendectin, acknowledged in his testimony that there is an entire specialty in medicine dealing with the interreaction of ingredients in drug compounds, and that the effect of a such a compound cannot be predicted simply by looking at its individual ingredients. See note 5, *supra*.

testimony and discussed a number of studies. Appellee then called several of the authors of studies relied upon by Dr. MacMahon. They all conceded that there were studies which had both an increased and a decreased relative risk for Bendectin users. Their testimony made clear that the relative risk calculated for a particular study was not carved in stone. For example, Dr. Jorge Michaelis calculated the relative risk for his study as 0.95 (showing a decreased risk), but he said that it could also be computed as 1.37 (indicating an increased risk). Appellee's expert testimony in this area was met head-on by appellant's rebuttal witness, Dr. Swan. She testified that appellee's experts had incorrectly dismissed many studies as meaningless because the number "1" fell within the confidence interval. Moreover, she regarded Dr. MacMahon's calculations in which he added the relative risks of several studies as "very improper." She said that because the "studies are not equal in validity," what he did was similar to adding "apples and oranges."

It is clear from a review of the record that the verdict was not against the weight of the evidence. There was evidence on both sides of nearly every issue, and it was fairly evenly weighted. Taking all the testimony into account, we hold that the trial court abused its discretion in granting a new trial on the ground that the verdict was against the weight of the evidence. See *Rich v. District of Columbia, supra*, 410 A.2d at 535-536.

V

Appellee makes several additional arguments in support of the trial court's new trial order. They are all without merit.

First, appellee contends that the court properly granted a new trial because it had erred in admitting Dr. Hassell's *in vitro* study into evidence; the study should have been excluded, says appellee, because it was hearsay. We reject this argument because the record shows that ap-

appellee waived its right to make a hearsay objection to the admission of this or any other study relied upon by Dr. Done at trial. When appellee's counsel sought the admission of a study relied upon by one of appellee's experts, appellant's counsel objected on the ground that the study was hearsay, but the court overruled the objection, saying:

THE COURT: . . . [I]t was understood from the very beginning that instead of bringing in all these authors of studies that were going to be relied upon in the testimony, that you would only have to bring the authors that were challenged. . . .

Now, those are the ground rule[s] that I concluded have been set up in this case.

We are satisfied that appellee waived any right it may have had to object to the admission of the Hassell study on hearsay grounds.⁹

Second, appellee contends that the court erred in allowing the jury to hear Dr. Swan's rebuttal testimony. There is no merit to this claim. The scope of rebuttal testimony is committed to the sound discretion of the trial court, *Adams v. United States*, 379 A.2d 961, 965 (D.C. 1977), and in this case the court carefully limited the testimony to those issues which were first raised by appellee in its defense. See *Robinson v. Parker*, 11 App. D.C. 132, 138 (1897). It plainly did not abuse its discretion.

Third, appellee claims that the court erred in preventing it from cross-examining Dr. Done about certain testimony he had given before the Food and Drug Administration. On redirect examination, Dr. Done was discussing "clustering," which he explained "refers to the oc-

⁹ Even if we were to hold that the Hassell study was inadmissible, its admission would surely be harmless error because it was just one small piece of the evidentiary mosaic.

currence . . . [or a] defect with a rate very much higher than one expects." When asked whether he had previously stated his view about clustering, he replied, "Well, yes, I have had that viewpoint for a very long period of time and have testified to that before hearings at the Food and Drug Administration." Somehow appellee concludes that this statement "left the clear impression that Dr. Done's conclusions were agreed to by the FDA." We cannot agree. Dr. Done merely said that he had testified before the FDA. If any unwarranted impression was left at all thereafter, it was due to appellee's re-cross-examination of Dr. Done:

Q. Doctor, you testified on redirect examination that you testified before the Food and Drug Commission [*sic*] in the maternity and fertility health drug advisory committee; is that correct?

A. Well, most of that characterization is yours but that is correct. Yes.

Q. Is that who you testified before?

A. If that is who it says, yes.

Q. But that advisory committee did not accept your testimony, did not follow your opinion, did they?

A. Well, to some degree they did, yes.

Q. And in fact they indicated—

THE COURT: We are not trying that.

MR. NACE [counsel for appellant]: Objection.

THE COURT: Sustained.

To the extent that Dr. Done's testimony on this point was prejudicial, the prejudice was cased by appellee's own questioning. Dr. Done never said anything about the FDA's acceptance of his views until asked by appellee's counsel. In any event, the court quite properly cut off counsel's line of questioning because it was irrelevant. The advisory committee may have had a number of reasons for accepting or rejecting his testimony that would have no bearing on this case. Relevancy rulings are com-

mitted to the sound discretion of the trial court, *e.g.*, *Jones v. Prudential Insurance Co.*, 388 A.2d 476, 481-482 (D.C.1978), and we find no abuse of discretion here. We cannot sustain the granting of a new trial on this ground.

Fourth, appellee contends that the court properly granted a new trial because it had erred in not permitting Richard Smith, one of appellee's employees to testify that Bendectin had been used in more than thirty-three million new therapy starts (prescriptions). Appellee argues that the "fact that Bendectin usage increased at a dramatic rate during a period when the incidence of limb reduction defects remained constant would have shown that Bendectin was not responsible for an increased incidence of birth defects," and that this was "an important aspect of its defense." We reject this argument because the fact to which Smith would have testified had already been put before the jury by Dr. Charles Epps, one of appellee's witnesses (whom the court warned not to repeat it). Furthermore, very similar testimony was given by Dr. MacMahon, who noted that between 1966 and 1978 there had been a fourfold increase in the issuance of Bendectin prescriptions, but that the overall rate of congenital malformations had declined during that time. On the weight to be given to this information, MacMahon testified, "I would not go so far [as] to say that [Bendectin] does not [cause an increase in defects] because this is a rather indirect kind of evidence. For what it is, it is that." There is thus no substance to the assertion that appellee was "prejudicially prevented from presenting an important aspect of its defense."

Finally, appellee contends that it was unfairly prejudiced by the introduction of evidence regarding errors in the performance of the Bunde-Bowles study, and that the new trial order should be upheld for that reason. Appellee maintains that the attack on the study would have been allowable if Dr. Done had used these errors

to show that the study exhibited a "positive causation finding," but that it was improper in this case because Dr. Done conceded that the study was meaningless. Dr. Done made no such concession. On the contrary, he concluded that the Bunde-Bowles study showed that babies who were exposed to Bendectin had a 30 to 80 percent higher risk of birth defects than those who were not. We therefore reject appellant's argument because its premise is refuted by the record.

VI

For the foregoing reasons we reverse the order from which this appeal is taken. We remand the case to the trial court with directions to reinstate the jury verdict awarding compensatory damages, and to conduct further proceedings on the issue of punitive damages.

Reversed and remanded.

APPENDIX F

**SUPERIOR COURT OF THE
DISTRICT OF COLUMBIA
CIVIL DIVISION**

Civil Action No. 1245-82

Civil I

JUDGE HANNON

MARY VIRGINIA OXENDINE,

Plaintiff,

v.

MERRELL DOW PHARMACEUTICALS, INC.,

Defendant.

ORDER

[Filed Sep. 1, 1983]

Before the Court are the motions filed by defendant Merrell Dow Pharmaceuticals, Inc. for judgment notwithstanding the verdict, and, in the alternative, for a new trial. Defendant has also filed an additional motion seeking to reduce judgment liability.

The Court has carefully considered the motions, the points and authorities in support thereof and in opposition thereto, as well as defendant's reply, the supplementary points and authorities filed by plaintiff, after having been granted leave of Court to file same, and the opposition thereto. The Court also heard oral argument on the motions on July 25, 1983 and has carefully considered all of the evidence in this case.

It is clear that as a necessary prerequisite to proving her claim plaintiff had the burden of establishing that Bendectin, the ethical pharmaceutical manufactured by defendant, was a teratogen when ingested by pregnant

women. Following therefrom, plaintiff had the burden of proving that plaintiff's mother, Joan W. Oxendine's use of Bendectin after the plaintiff's conception, proximately caused the birth defect with which plaintiff was born.*

In support of her case to establish proximate cause, plaintiff relies on four principal grounds. The first is the structural activity of Bendectin which included an anti-histaminic component, together with the awareness that certain antihistamines have been determined to be teratogenic in certain animals. Plaintiff also relies on the animal or *in vivo* studies. The third ground involves the *in vitro* studies performed at the National Institutes of Health. Finally, plaintiff relies on human epidemiological data.

It is clear to the Court from a review of the evidence adduced at the trial of this action, that no conclusion one way or another, can be drawn from any of the above relied upon bases, respecting whether Bendectin is a human teratogen. And it is also clear from the evidence that plaintiff has failed to prove that use of Bendectin by her mother proximately caused her birth defect.

For these reasons, and for the additional reasons expressed in Merrell Dow's motion for judgment notwithstanding the verdict, it is by this Court this 1st day of September, 1983,

ORDERED that defendant's motion for judgment notwithstanding the verdict be, and the same hereby is, granted; and it is

* This case was submitted to the jury on theories of negligence, strict liability and breach of implied warranty. The jury found in favor of plaintiff on each of the three theories. In order to do so, in each instance, the jury had to conclude that plaintiff had established by the preponderance of the evidence that the drug Bendectin proximately caused plaintiff's birth defect. Therefore, the Court need only address this issue of proximate cause.

FURTHER ORDERED, in the alternative, inasmuch as the jury verdict is against the great weight of the evidence, that defendant's motion for a new trial be, and the same hereby is, granted; and it is

FURTHER ORDERED that defendant's motion to reduce judgment liability be, and the same hereby is, denied as moot.

/s/ Joseph M. Hannon
JOSEPH M. HANNON
Judge

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APPENDIX G

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 88-335

MARY VIRGINIA OXENDINE,*Appellant,*

v.

MERRELL DOW PHARMACEUTICALS, INC.,

Appellee.

On Appeal from the Superior Court of the
District of Columbia
Civil Division

Before: Rogers, Chief Judge, and Ferren and Belson,
Associate Judges.

JUDGMENT

[Filed Oct. 11, 1989]

This cause came on to be heard on the transcript of record, the briefs filed, and was argued by counsel. On consideration whereof, and for the reasons set forth in the opinion filed this date, it is now hereby

ORDERED and ADJUDGED by this court that the judgment on appeal is reversed and this cause is remanded with instructions to reinstate the jury verdict as directed in *Oxendine v. Merrell Dow Pharmaceuticals, Inc.*, 506 A.2d 1100 (D.C. 1986).

For the Court:

/s/ R. B. Hoffman
RICHARD B. HOFFMAN
Clerk

Dated: August 11, 1989.

Opinion per Chief Judge Judith W. Rogers.

APPENDIX H

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 88-335

MARY V. OXENDINE,

Appellant,

v.

MERRELL DOW PHARMACEUTICALS, INC.,

Appellee.

Before: *Rogers, Chief Judge; Mack, Newman, *Ferren,
*Belson, Terry, Steadman, Schwelb, and Farrell,
Associate Judges.

ORDER

[Filed Sep. 29, 1989]

On consideration of appellee's petition for rehearing
or rehearing en banc, and the response thereto, and ap-
pellant's motion to expedite action on petition for reheat-
ing or rehearing en banc, it is

ORDERED by the merits division* that the petition
for rehearing is denied; and it appearing that no judge
of this court has called for a vote on the petition for re-
hearing en banc, it is

FURTHER ORDERED that the petition for rehearing
en banc is denied. It is

FURTHER ORDERED that the motion to expedite action on the petition is denied as moot.

PER CURIAM

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No. 89-951

Supreme Court, U.S.
FILED
JAN 11 1990

JOSEPH F. SPANIOL, JR.

IN THE

Supreme Court of the United States
OCTOBER TERM, 1989

MERRELL DOW PHARMACEUTICALS INC.,

Petitioner,

v.

MARY VIRGINIA OXENDINE,

Respondent.

BRIEF OF MARY VIRGINIA OXENDINE
IN OPPOSITION

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QUESTION PRESENTED

May this Court entertain the petition filed herein when that petition presents no federal issue and does not even pretend to identify a treaty, federal statute, or Constitutional provision involved in this case? See 28 U.S.C. 1257.



RESTATEMENT OF THE CASE

In view of our position, stated *infra*, that the Petition for Certiorari is not within the certiorari jurisdiction of this Court and also is so meritless as to be classified as frivolous, it seems hardly necessary to restate the facts so as to give this Court an accurate picture of the decision below. We do so, however, in very short compass.

First, we point out that the only decision before the Court, on this Petition, is the *second* decision of the District of Columbia Court of Appeals in this *Oxendine* matter, the decision known as *Oxendine II*, reported at 563 A.2d 330 and reprinted at App.1a. That decision deals only with how the Court of Appeals, in the exercise of its appellate jurisdiction, handled the findings and order of the trial judge made under D.C. Superior Court Rule 60(b). The first decision of the Court of Appeals in this case, known as *Oxendine I*, reported at 506 A.2d 1100 and reprinted at App.43a, is not before this Court; that decision terminated in 1987, with the denial of all motions including one for rehearing *en banc*, and certiorari was not sought. It was the decision in *Oxendine I* that ruled on the substantive portion of this case; it upheld the jury verdict that Bendectin was the cause of plaintiff's birth deformities. The Petition for Certiorari attempts, pp.10-13, 18-20, to insinuate the elements of *Oxendine I* into this proceeding by discussing alleged changes in the substantive law that have occurred since the date of that decision. Those matters are not involved here.

Second, the Petition omits completely to present the background and accomplishments of Dr. Alan K. Done, who was the subject of the Motion Judge's ire. For all that the Petition sets forth, it might be concluded that Dr. Done was an impostor, or at the least a scientist of minimum attainments. For example, the Petition presents Dr. Done as attempting to inflate his position in the field of toxicology, see Pet.p.8, n.7, to the extent that he gave himself a faculty "toxicology" title (Professor of Pharmacology and Toxicology) that did not exist,

see Pet. at pp.7-8. It may thus come as a surprise that Dr. Done is one of the outstanding experts in toxicology in this country. His impressive Curriculum Vitae runs 25 pages. He is a medical doctor specializing in pediatrics, pharmacology, and toxicology. He held professorships at the University of Utah, the University of Utah College of Pharmacy (where he was Professor of Clinical Pharmacology and Toxicology), and Wayne State University School of Medicine, and was Adjunct Professor at the Wayne State University School of Pharmacy and Allied Health Sciences. He served for four years as Special Assistant to the Director (for Pediatric Pharmacology) of the Bureau of Drugs, U.S. Food and Drug Administration.

Dr. Done served on the Editorial Boards for the publications entitled "Clinical Toxicology", "Clinical Pharmacology and Therapeutics", "Toxicology and Applied Pharmacology," and "Handbook of Analytical Toxicology". He was the Poisons Editor of the publication "Emergency Medicine". Dr. Done's C.V. contained a large number of Consultantships, Fellowships, Honors, and Certifications in toxicology and pediatrics, and listed 168 technical papers of which he was the author or co-author; it also lists countless engagements as chairman, organizer, speaker, or participant in various meetings and symposia in toxicology, pharmacology, and associated fields. To top this off, Dr. Done was the recipient of the first Joint Recognition Award of the American Academy of Clinical Toxicology and the Canadian Academy of Clinical and Analytical Toxicology.

There is much more, but this is enough to convey to this Court the flavor of Petitioner's Statement of the Case. The idea that Dr. Done, whose title at Wayne State was Professor of Pediatrics and Pharmacology, called himself Professor of Pharmacology and Toxicology in order to boost his status in toxicology, is ludicrous.¹

¹Dr. Done did not speak in capital letters; it was the court reporter who put the capitals on, and thus appeared to create a faculty title. It is undisputed that toxicology is taught as part of pharmacology, which is all that Dr. Done was saying.

Third, the Petition states, p.14, that the basis for the Court of Appeals decision "to disregard nearly all the perjury" was the lack of diligence of Merrell Dow's counsel in not discovering the facts before trial. This "lack of diligence" theme is then rehashed in the Reasons for Granting the Writ, pp.16-18.

Even if this were the sole basis of the Court of Appeals, it is obviously not a ground for granting certiorari. But a glance at the Court of Appeals decision, pp.9a-15a, shows that the court found that *there was no perjury*. After discussing the diligence factor, the Court of Appeals turned to the six alleged misstatements of Dr. Done and said, somewhat delicately, that as to five of them, "our reading of the record differs substantially from" the trial judge's reading, p.10a. As to the sixth, the Court pointed out that a finding of perjury requires a finding of materiality, and in view of Dr. Done's "qualifications to teach and his significant contributions to his field of expertise", p.12a, and in view of Dr. Done's "distinguished forty-year career in his fields of expertise", p.15a, his misstatement as to his faculty status at the time of his testimony was not material.

REASONS FOR DENYING THE PETITION

Rule 49.2 of this Court provides that if a petition for certiorari is "frivolous", the Court may award the respondent "appropriate damages". The petition filed in this case is a prime candidate for the post of "frivolous".

There is no jurisdiction in this case.² 28 U.S.C. 1257(a) provides for review by this Court, on writ of certiorari, of final

²The petition concedes that the jurisdictional basis here must be—if anything—28 U.S.C. 1257 (see Pet., p. 2), which deals with final judgments rendered by "the highest court of a State", and provides that for this purpose, that phrase includes the District of Columbia Court of Appeals. As Professor Moore points out, 12 *Moore's Federal Practice* 8-55, that court "should not be confused with the United States Court of Appeals for the District of Columbia" Circuit, to which 28 U.S.C. 1254 applies.

judgments or decrees rendered by the highest court of a State

where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

The Petition for Certiorari does not identify or even mention a treaty, a federal statute, a state statute, or any provision of the Constitution. The "Reasons for Granting the Writ", pp. 15-20, like all the rest of the Petition, deal solely with the manner in which the D.C. Court of Appeals handled the appellate process of its own court system. (And the decisions cited by the Petition, like *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238 (1944), cited at p. 16, deal with *federal* courts.) Accordingly, 28 U.S.C. 1257(a) is not invoked and this Court does not have jurisdiction to entertain this Petition for Certiorari. Not a single issue of federal interest is raised.

Indeed, petitioner has ignored completely the guideposts of Rule 17.1(b) and (c) of this Court which provide that the basis for granting certiorari, where non-federal courts are concerned, is the involvement of a "federal question" or "an important question of federal law".³ Petitioner has presented nothing to this Court except complaints about the manner in which the highest court of a "state" has handled its own appellate jurisdiction. Even if this were a case coming from a federal

³Of course the petition also violates Rule 21.1(h) of this Court which requires that "if review of the judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings, both in the court of first instance and in the appellate court, at which the *federal questions* sought to be reviewed were raised, . . ." (Emphasis added) We speak here of the Rules in effect when the petition was filed.

court, petitioner has shown nothing but a disagreement with the way the court has dealt with an abuse-of-discretion contention, and thus the petition involves nothing but the facts of this one case; but coming as it does from a non-federal court system, the matter does not even fall within the supervisory power of this Court over the federal system. This Court is not about to tell another court system how to conduct its managerial affairs, nor could it do so unless some Constitutional right were involved.

It seems unnecessary, after what we have said, to treat in detail the alleged points raised by petitioner in its Reasons for Granting the Writ (pp.15-20), but we will comment briefly.

We begin by noting that an appeal is not a Constitutional right; the Constitution guarantees only a right to trial in one court. *Cobbledick v. United States*, 309 U.S. 323, 324-5 (1940); see *Civil Procedure*, James & Hazard (3rd Ed., 1985), p.661. A state need not have an appellate procedure at all. If it does, the procedure may of course vary from that which obtains in federal courts. For example, the "final judgment" rule so familiar in federal courts need not apply in state court systems, and some states do permit appeals from most interlocutory orders, New York being the prime example. See *Civil Procedure*, James & Hazard, *supra*, at p.43.

It is thus remarkable to note that in this case, dealing with a non-federal appellate system, every decision cited in the Reasons for Granting the Writ is a decision involving the *federal* court system and the Rules of Procedure governing the federal courts (except for citations dealing with the obligations of counsel). Those decisions are totally inapplicable here. Whether or not (to take up the three Reasons stated on page 15 of the Petition) a state appellate court may substitute its own factual findings for those of its trial courts, or create a new standard requiring opposing counsel to detect perjury at trial, or refuse to consider recent changes in law where judgments are not yet final—those are matters solely for the state court;

they involve no federal issue. As the Court said in *Linkletter v. Walker*, 381 U.S. 618, 629 (1965), with regard to whether recent changes in the law must be taken into account by an appellate court:

. . . the Constitution neither prohibits nor requires retrospective effect. As Justice Cardozo said, "We think the Federal Constitution has no voice upon the subject".⁴

This Petition for Certiorari, meritless as it is, and lacking jurisdiction, seems clearly to have been filed solely for the purpose of delay.⁵ On that ground alone it is sanctionable under Rule 49.2 as "frivolous". *Dening v. Carlisle Packing Co.*, 226 U.S. 102, 106 (1912); *Gibbs v. Diekma*, 262 U.S. 226, 233 (1923). And see *Tatum v. Regents of Nebraska-Lincoln*, 103 S.Ct. 3084 (1983), for application of the "frivolous" rule as to the merits.

⁴This would be true even if there were "a change in the law", to use petitioner's phrase. But there is no change in the law even in the sense of the cases cited in the Petition. All that we have in the Bendectin situation is the decision of various courts on the facts before them; nothing is "changed". The "change in law" argument stems from the foundation case of *United States v. Schooner Peggy*, 1 Cranch 103, 110 (1801), where Chief Justice Marshall said: "But if subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed or its obligation denied". He went on to say that "in mere private cases between individuals, a court will and ought to struggle hard against a construction which will, by a retrospective application, affect the rights of parties, but in great national concerns . . . the Court must decide according to existing laws". (Emphasis added) Of course *Schooner Peggy* was a federal question case.

⁵The Complaint in this case was filed in 1982; the trial took place in May, 1983. The case has now twice been through the District of Columbia Court of Appeals, each time resulting in a victory for the plaintiff—a young girl born with birth defects and deformities which the Court of Appeals has found were caused by petitioner's product, Bendectin. But plaintiff thus far has not received one penny from petitioner, owing to the snowstorm of pleadings, motions, and legal maneuverings of the petitioner.

CONCLUSION

The Petition for Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 11th day of January, 1990, three copies of the foregoing was mailed, postage prepaid to Vincent H. Cohen and Walter A. Smith, Jr., Hogan & Hartson, 555 13th Street, N.W., Washington, D.C. 20004.

Barry J. Nace

No. 89-951

Supreme Court, U.S.

FILED

JAN 19 1991

JOSEPH E. SPANIOL, JR.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

MERRELL DOW PHARMACEUTICALS INC.,
Petitioner,
v.

MARY VIRGINIA OXENDINE,
Respondent.

On Petition for a Writ of Certiorari to the
District of Columbia Court of Appeals

REPLY BRIEF FOR PETITIONER

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IN THE
Supreme Court of the United States
- OCTOBER TERM, 1989

No. 89-951

MERRELL DOW PHARMACEUTICALS INC.,
Petitioner,

v.

MARY VIRGINIA OXENDINE,
Respondent.

On Petition for a Writ of Certiorari to the
District of Columbia Court of Appeals

REPLY BRIEF FOR PETITIONER

In her Opposition, respondent contends that certiorari should be denied for two reasons. First, she says that because no "federal interest" is present, this Court has no jurisdiction under 28 U.S.C. § 1257(a) to review the case. Opposition ("Opp.") 4. Second, she contends that because the District of Columbia need not have provided for appellate review at all, the D.C. Court of Appeals is free to "manage" appeals any way it chooses—including, as here, by "substitut[ing] its own factual findings for those of its trial courts, . . . creat[ing] a new standard requiring opposing counsel to detect perjury at trial, or refus[ing] to consider recent changes in law . . ." Opp.

5. All such matters, respondent argues, are "solely for the state court" to resolve, and "[t]his Court is not about to tell another court system how to conduct its managerial affairs . . ." *Id.*

Respondent is mistaken about this Court's certiorari authority over the D.C. Court of Appeals. She is also mistaken to suggest that nothing more than unreviewable "managerial" details are presented here.

1. It is true that the issues in this case must arise "under the Constitution or . . . statutes of . . . the United States" in order to trigger this Court's jurisdiction. 28 U.S.C. § 1257(a). Contrary to petitioner's contention, however, the issues presented here meet that requirement for two separate reasons.

a. First, as petitioner specifically argued below, the Court of Appeals' announcement of a new rule requiring petitioner's counsel to have detected all perjury at trial or be barred from ever attacking it, and its refusal to entertain changes in law occurring since its previous decision, violated petitioner's right to constitutional Due Process.¹ Indeed, this Court's decisions concerning the claims petitioner has raised recognize the constitutional dimension of the questions raised by those claims. *See, e.g., Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 486 n.16 (1981) (fundamental fairness dictates that "appellate court must apply the law in effect at the time it renders its decision") (emphasis supplied) (quoting *Thorpe v. Housing Authority of City of Durham*, 393 U.S. 268, 281 (1969)); *Hazel-Atlas Glass Co. v. Hartford Empire Co.*, 322 U.S. 238, 246 (1944) ("preserva-

¹ Petitioner raised its Due Process argument in its rehearing petition (at p. 5); this was petitioner's first opportunity to do so because the Court of Appeals' new rule condoning perjury and its complete refusal even to consider the change in law affecting Benadectin were both announced for the first time in the decision and judgment here under review.

tion of the integrity of the judicial process" and "the administration of justice" cannot always depend on "the diligence of litigants" to uncover deception and fraud); *see also Evitts v. Lucey*, 469 U.S. 387, 404 (1985) ("arbitrary" judicial decision that imposes different responsibilities on similarly situated parties "violate[s] due process principles").

b. Second, and again contrary to respondent's view, there is a *federal statute* at issue in this case, and its proper construction and implementation is a matter within the jurisdiction of this Court. The D.C. Court of Appeals was created not by a state legislature but by the Congress of the United States, pursuant to its power to legislate for the District of Columbia. U.S. Const. art. I, § 8, cl. 17. That court's authority and responsibility was established by Congress in the 1970 Court Reform Act, D.C. Code § 11-102.

Petitioner denies that Congress intended the D.C. Court of Appeals to have the unfettered "managerial" authority to do what it did here—*i.e.*, substitute its own fact-findings for that of the D.C. trial courts, fashion a rule insulating perjury from appellate review, and refuse to entertain significant changes in law. More importantly, we submit that the question whether the court indeed has that authority is itself a *federal* question within this Court's jurisdiction. As this Court has consistently held regarding its unique authority over the D.C. Court of Appeals, "Congressional Acts directed toward the District, *like other federal laws*, admittedly come within this Court's Art. III jurisdiction, and we are therefore not barred from reviewing the interpretations of those Acts by the District of Columbia Court of Appeals in the same jurisdictional sense that we are barred from reconsidering a state court's interpretation of a state statute." *Pernell v. Southall Realty Co.*, 416 U.S. 363, 368-69 (1974) (emphasis supplied). *Accord Whalen v. United States*, 445 U.S. 684, 687-88 (1980).

2. Addressing the merits of the questions we have presented, respondent relies again on her contention that because the District of Columbia need not have provided appellate review at all, the way in which it manages appeals cannot present an important federal question for this Court. She also makes three other points about the merits, all of which are wrong.

a. As we have shown, our Due Process claims and the proper implementation of the Court Reform Act are both federal matters. Moreover, while it is true that appellate review need not have been afforded, once Congress afforded it the Court of Appeals was of course bound to follow Due Process in "managing" that appellate review.² Furthermore, where, as here, the District of Columbia has adopted for itself the federal rule entitling parties to a new trial on the basis of perjury (Rule 60), the proper construction of that rule becomes a matter of national consequence that merits this Court's review.³

b. In an effort to suggest that the questions we have raised are not fairly presented, respondent makes three remaining points. First, she says that the Court of Appeals' first decision in this case—holding that the sci-

² See *Evitts v. Lucey*, 469 U.S. 387, 400-01 (1985); *Lindsey v. Normet*, 405 U.S. 56, 77 (1972).

³ See, e.g., *Miller v. United States*, 357 U.S. 301, 306 (1958) (finding review warranted where rule developed by District of Columbia courts is "substantially identical" to federal statute that "is not confined in operation to the District of Columbia"); *Del Vecchio v. Bowers*, 296 U.S. 280, 285 (1935) (finding review of D.C. statute warranted where it adopts provisions of federal statute and is therefore not "confined in its operation to the District of Columbia").

Moreover, inasmuch as the District of Columbia Court of Appeals falls within the parameters of the federal court system, this Court may in any event review this action under its supervisory authority over the administration of justice in the federal courts. See, e.g., *McNabb v. United States*, 318 U.S. 332, 341 (1943) (citing *Nardone v. United States*, 308 U.S. 338, 341-42 (1939)); see also *Gay v. United States*, 411 U.S. 974, 975-76 (1973) (Douglas, J., dissenting).

tific evidence presented was sufficient to prove respondent's case—is not properly before this Court. Opp. 1. That is not correct. At the time the Court of Appeals denied rehearing from its first decision (*Oxendine I*), that court had already authorized the Rule 60(b) proceedings now before this Court. Because those proceedings were then continuing in the trial court, *Oxendine I* did not constitute a "final judgment" within the meaning of 28 U.S.C. § 1257(a). Only when the Court of Appeals finally resolved liability in *Oxendine II* was there a reviewable "final judgment" from that court;⁴ accordingly, the present petition is petitioner's first opportunity to bring *Oxendine I* before this Court.

c. Next, petitioner says there has been no "change in the law" that the Court of Appeals should have considered in *Oxendine II*. Opp. 6 n.4. This is simply a refusal to acknowledge what happened after *Oxendine I* was decided. After that case came down, every single appellate court addressing the matter—including three

⁴ Unlike the situation when the merits of the case were still pending in the Rule 60(b) proceedings, all that now remains to be resolved in the lower courts is respondent's claim for punitive damages. In such circumstances—when the highest state court's resolution of the merits of a case is complete—this Court has found jurisdiction present under § 1257. See, e.g., *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 108 S. Ct. 2428, 2438 n.11 (1988) (ruling of Mississippi Supreme Court that state administrative proceedings were not preempted by federal law deemed "final judgment" notwithstanding remand to conduct such proceedings); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 907 n.42 (1982) (ruling of Mississippi Supreme Court on merits of issues concerning liability deemed "final judgment" notwithstanding remand for recomputation of damages); see also *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 477-85 (1975) (describing four categories of cases in which this Court has treated decision on federal issue as final without awaiting completion of additional proceedings in lower state courts); R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* 128-33 (6th ed. 1986) (discussing finality under § 1257 when further proceedings are contemplated).

federal appellate courts⁵—has held that the available scientific evidence is insufficient as a matter of law to prove that Benedectin causes birth defects. Only in the local District of Columbia courts—and only because the District of Columbia Court of Appeals has refused even to address the issue—is the prevailing law to the contrary.

d. Finally, respondent contends that the Court of Appeals “found that *there was no perjury*” in this case at all. Opp. 3 (emphasis in original). That is simply not so. Putting to one side whether the Court of Appeals would have had authority to “find” that there was *no* perjury when the trial court found Dr. Done’s pivotal testimony so replete with perjury and “so deliberately false that *all* his testimony on behalf of [respondent] is suspect,”⁶ the truth is that the Court of Appeals did *not* hold that there was no perjury. Rather, that court “found” that nearly all the perjury was “discoverable prior to trial” by petitioner’s counsel and for that reason “cannot form a proper basis for granting” a new trial. App. 9a. *That* is the holding below. It is true that the court also added—improperly in our view—that its “reading of the record differs substantially” from the trial court’s regarding the perjury; but the court expressly stated that “we do not base our decision on this ground.” App. 10a. Rather, as stated, its decision was premised on its unprecedented, unsupported pronouncement that petitioner’s counsel—but not respondent’s own counsel—failed in their duty to prevent the perjury from occurring and that, accordingly, a verdict premised on such perjury must stand.

⁵ *Brock v. Merrell Dow Pharmaceuticals Inc.*, 874 F.2d 307, opinion modified on petition for reh’g, 884 F.2d 166, reh’g en banc denied, 884 F.2d 167 (5th Cir. 1989); *Richardson v. Richardson-Merrell Inc.*, 857 F.2d 823 (D.C. Cir. 1988), cert. denied, 110 S.Ct. 218 (1989); *Lynch v. Merrell-National Laboratories*, 830 F.2d 1190 (1st Cir. 1987).

⁶ App. 36 (emphasis in original).

CONCLUSION

For the foregoing reasons, and those stated in our petition, the writ of certiorari should be granted.

Respectfully submitted,

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